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A

TREATISE

ON THE

LAW OF LEGACIES,

BY THE LATE

R. S. DONNISON ROPER, Esq.

BARRISTER AT LAW, OF GRAY'S INN.

UNDER AN ENTIRELY NEW ARRANGEMENT, AND WITH VERY CONSIDERABLE ADDITIONS,

BY HENRY HOPLEY WHITE, Esq.

BARRISTER AT LAW, OF THE MIDDLE TEMPLE.

IN TWO VOLUMES.

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THE EDITOR.

PREFACE.

The late learned Author had intended to republish his Treatise on the Law of Legacies under an entirely new arrangement; and at his death left the thirteen first chapters and part of another prepared with that view, but without any other manuscripts from which even an outline of his plan respecting the remainder of the work could be collected. The completion of this design devolved upon the Editor, in the prosecution of which he has avoided, as much as possible, alterations in the manuscript chapters left by the late Author, beyond verbal corrections and the addition of subsequent decisions.

The substance of the former Editions will be found in the present, but under a new arrangement, which has been adopted in the hope of rendering the work more useful, and at the same time a more accurate and comprehensive analysis of a complicated subject. To obviate objections which have been made to the lengthened statements of cases in the former Editions, considerable pains have been bestowed in compressing them within the smallest compass consistent with utility.

The Editor feels confident that the chapters left by the late Author, and forming about one third of the present volumes, will not disappoint the expectations of those acquainted with his intention of republishing.

In presenting to the profession the remaining portion of the work, the Editor cannot divest himself of much anxiety, lest an undertaking, so ably commenced, should have been concluded in a manner derogating from the high reputation of his deceased friend, and he entertains the hope, that any attempt to diminish the labours of others, in a subject of such acknowledged intricacy, will be received with indulgence.

Lincoln's Inn,
January, 1828.

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A TREATISE

ON

THE LAW OF LEGACIES.

CHAPTER I.

Of Donations mortis causâ.

Proper Legacies may be classed under two heads; viz. *General* and *Specific*. The former may be defined the testamentary gift of personal estate as of goods and chattels, or money generally. The latter, the bequest of particular things distinguished from all others of the same kind, as of money in a bag, a piece of plate, or a term of years. There is an *improper* kind of Legacy, termed a *Donatio mortis causâ*, which it is proposed to consider in the present chapter. The subject will be discussed under the following divisions:

Sect. I. The description and nature of a *Donatio mortis causâ*.

Sect. II. The circumstances required to constitute a *Donatio mortis causâ*.

1.—*As to the gift of the Donee.*
2.—*The delivery of Possession; and,*
3.—*Of Evidence admissible to prove the gift and the sufficiency of such evidence.*

Sect. III. What will defeat the Donation when originally good.

I. The description and nature of a *Donatio mortis causâ*.

Swinburne(*a*) on the authority of the *Digest*(*b*) notices three kinds of Donations *mortis causâ*.

First, Where a person, *not terrified* by the apprehension of any *present peril*, but moved by the *general consideration* of man's mortality, makes a gift.

Secondly, Where a person moved by imminent danger, gives in such a manner, that the subject is *immediately* made his to whom it is given.

And thirdly, Where a person, being *in peril of death*, gives something, yet *not* so that it should be *presently his* who received it, but *in case only the giver die.*

It appears upon consideration of the before mentioned definitions, that the third alone is the proper donation *mortis causâ;* the other two being nothing more than pure irrevocable gifts *inter vivos.* This also is apparent from the definition of a donation *mortis causâ*, given by Justinian after the contest which prevailed on the subject had subsided:—"Mortis causâ donatio est, *quæ propter mortis fit suspicionem, cum quis ita donat*, ut si quid humanitus ei contigisset, haberet is qui accepit, sin autem supervixisset is, qui donavit, reci-

(*a*) Swinb. part I. sect. 7. (*b*) *Julianus*, lib. 17. Digest.

peret; vel si eum donationis pœnituisset, aut prior decesserit is, cui donatum sit. Hæ mortis causâ donationes ad exemplum legatorum redactæ sunt per omnia: nam cum prudentibus ambiguum fuerat utrum donationis an legati instar eam obtinere oporteret, et utriusque causæ quædam habebat insignia et alii ad aliud genus eam retrahebant; a nobis constitutum est; ut per omnia fere legatis connumeretur, et sic procedat quemadmodum nostra constitutio eam formavit, et in summâ mortis causâ donatio est, cum magis sequis velit habere quàm eum, cui donat, magisque eum, cui donat, quàm hæredem suum."(*c*)

With respect to the nature of a *donatio mortis causâ*, this kind of amphibious gift so far resembles a legacy that it is ambulatory and incomplete during the donor's life; it is therefore revocable by him,(*d*) and subject to his debts upon a deficiency of assets.(*e*) It is also liable to the duties imposed upon legacies by the express provision of the stat. 36 Geo. 3. c. 52. § 7. But in the following particulars a donation *mortis causâ* differs from a legacy. It is not within the jurisdiction of the Ecclesiastical Court, nor is it to be possessed by the executor; so that a court of common law has *prohibited* his proceeding in the Ecclesiastical Court, to recover the subject from the donee.(*f*) Neither does the donation regularly fall within an administration, nor require any act by the executors to constitute a title in the donee.(*g*) The reason is, that the property being vested in the donee by delivery of the subject, liable only to be defeated by the donor's revocation, or recovery or escape from the peril of death; when none of those events happen, the title of the donee is derived from the donor during his life, and not by a testamentary act.

II. The circumstances required for the constitution of a *donatio mortis causâ* are, as before appears:

1. That the gift be made by the donor in peril of death, or during his last illness, and to take effect in case only the giver die.(*h*)

If then the gift have no relation to the death of the donor, or having such a reference it be general, that is, to his decease at any time, he being at the period of the donation in no danger of death, nor afflicted with any disorder which proved fatal to him, such gift cannot be supported as a donation *mortis causâ*.

Thus in *Tate* v. *Hilbert*,(*i*) *A.* having subsequently to his will sent for *M.* to his house, and observed that he was worth more than he thought of, and that his fortune was too much for one person, and therefore he would give away more than he had disposed of by his will, desired *J.* to give him out of his desk several bonds and securities to the amount of 3000*l.* and upwards, which he cancelled. He then told *M.* he would give her 200*l.* and desired *J.* to give him a *check* out of the drawer of his desk; which he having done, *A.* immediately filled it up, and signed and gave it to *M.*; *A.* at the same

(*c*) Justin. Inst. tit. 7. De Donationibus. (*d*) 7 Taunt. 231.
(*e*) *Smith* v. *Casen*, mentioned by the reporter at the end of *Drury* v. *Smith*, 1 P. Will. 406. 2 Ves. sen. 434. (*f*) *Thompson* v. *Hodgson*, 2 Stra. 777.
(*g*) 2 Ves. sen. 439. 2 Ves. jun. 120. 1 P. Will. 441.
(*h*) Justin. Inst. tit. 7. De Don. 4 Burns's Eccl. Law. 110. Pre. ch. 269. 3. P. Will. 357. 4 Bro. C. C. 290. 3 Madd. 185.
(*i*) 2 Ves. jun. 111. 4 Bro. C. C. 286. *S. C.*

time gave *J.* a promissory note for 1000*l.* It was determined, upon questions whether the gifts of the check and note could be supported as donations *mortis causâ*, that they could not. One of the reasons for this decision was, that the gifts of them were not made to take effect *in futuro* with a view to the donor's death, but *in præsenti* and irrevocably.

But it is not necessary for the donor to expressly declare that the gift was made conditionally, viz. to take effect only in the event of his death; for if the gift be made during his *last illness*, the law infers the condition that the donee is only to hold the subject in case the donor die of that indisposition.

Accordingly in *Gardiner* v. *Parker*,(*k*) *A.* being confined to his bed, gave to *B.* a bond for 1800*l.* two days before his death, in the presence of a servant, saying, "There take that and keep it." The question was between the donee and executors of *A.* And Sir *John Leach*, V. C. decided in favour of the donation, observing, that the doubt originated in the donor not having expressed that the bond was to be returned if he recovered; but that the bond being given in the extremity of sickness, and in contemplation of death, the intention of the donor was to be inferred that the bond should be holden as a gift only in case of his death; and that if a gift be made in the expectation of death, there is an implied condition that it is to be held only in the happening of that event.

So also in a prior case of *Lawson* v. *Lawson*,(*l*) the testator being languishing on his death bed, delivered to his wife a purse of gold, containing 100 guineas, and bid her *apply it to no other use but her own*, and the transaction was supported as a donation *mortis causâ*.

It is no objection to this species of donation, that the gift was not made to the donee free from incumbrance, but charged with the performance of a particular purpose. To this effect, *Eyre*, Lord Commissioner, expressed himself in the case of *Blount* v. *Burrow*,(*m*) as reported by Mr. *Brown*, and there seems to be no reason why the donee should not have the surplus money, if any remained after the special purpose was answered.

2. The next requisite to constitute a donation *mortis causâ* is *actual delivery* of the subject to or for the donee in cases where such a delivery can be made; it is a consequence of that proposition.

That if the delivery be incomplete, and only rest in the intention of the donor, the proposed donation cannot be supported.

Thus in *Bryson* v. *Brownrigg*,(*n*) *A.* by his will, dated the 4th of *December*, 1776, disposed of all his real and personal estates in trust for his wife, *Alice*, and his children, *Esther* and *Mary*, and appointed his wife and the trustees executors. The testator died in 1788, leaving his two daughters, his only children, both above the age of twenty-one, and married; *Mary* died; and the bill was filed by her husband and administrator and their only child, against the testator's widow, *Alice Brownrigg*, and the surviving trustee, and the testator's other daughter, *Esther*, and her husband, to have the will established, and an account, &c. The answer stated a gift by the testator in March, 1787, to *Esther*, then unmarried, of 200*l.* (*viz.*) 100*l.* due to him by bond, and 100*l.* by mortgage; sums, that according to the

(*k*) 3 Madd. 184. (*l*) 1 P. Will. 441. (*m*) 4 Bro. C. C. 75. (*n*) 9 Ves. 1.

answers, were so given to her as an equivalent for 100*l.* which *Mary* received under the will of her grandfather, and for another sum of 100*l.* which *Mary* or her husband received from the testator upon their marriage; and the interest of such gift having been from the time thereof accounted for and paid to *Esther* by the testator in his life-time, the defendant, *Alice Brownrigg*, paid the principal and interest received on the said bond and mortgage to her *(Esther,)* and claimed to be allowed those sums, as paid to her daughter. The plaintiffs disputing those payments, the defendants, *Alice Brownrigg* and *Esther*, were examined upon interrogatories; and by their examinations stated, that the mortgage and bond were, in 1786, or early in 1787, given by the testator to his daughter *Esther* in the following manner: the testator having frequently declared his determination to give 200*l.* to his daughter *Esther*, to place her upon an equality with his eldest daughter *Mary*, (who had on her marriage received the like sum,) selected the two securities in question for that purpose, and *Alice Brownrigg*, by his direction, took them out of a drawer, in which they lay with other securities and papers of the testator, and she by the like direction laid them distinctly and by themselves in another drawer, for and as the property of *Esther*, then a minor, to whom the same were pointed out, and were several times afterwards mentioned and spoken of as her own by the testator, who, in giving, and afterwards speaking of these securities to the examinants, said, as the securities were good, the money had better remain upon them until *Esther* should marry. At the death of the testator the two securities remained by themselves, and separately from his other securities, in a lower drawer of his bureau, of which *Alice Brownrigg* always kept the key. The interest which arose on them in the testator's life-time subsequently to such gift, was by his direction paid to *Esther*, as her own money; and *Alice*, after the decease of the testator, at the request of *Esther*, (who attained her age of twenty-one years a few days after the testator's death) continued to keep the two securities for her; and soon after her death, at her previous request, *viz.* on the 13th of February, 1789, called in the money and paid it to her husband *John Croft*. The master allowed the claim; upon which an exception was taken to his report; and in support of the report the delivery of the securities was contended to be good and effectual as donations *mortis causâ*. But by Sir *William Grant*, M. R. "has it ever been determined, that the mere delivery of the security passes the interest of the money? A *donatio mortis causâ* has something in the nature of a legacy. But I do not see, supposing delivery would do, how this can be called so, shifting it from one drawer to the other. It remains just where it was, except that it is in a different drawer, and separated from other papers. What could she have done if he chose to make use of these securities? It depends all upon his *mental intention*. This is not enough. I cannot think it the mode in which that kind of property can be conveyed." The exception was therefore allowed.

Another instance of imperfect delivery occurred in the case of *Bunn* v. *Markham*.(*o*) That was an action of trover, brought to recover from the defendants, who were the executors of Sir *Jervase*

(*o*) 7 Taunt. 224.

Clifton, bart. certain *India* bonds, bank notes, guineas, an iron chest, and the boxes and envelopes in which these securities and money had been contained. The cause was tried at Guildhall, at the sittings after Trinity Term, 1816, before *Gibbs*, C. J. The evidence was, that Sir *Jervase Clifton* being of an advanced age, and confined to his bed, and having by his will, dated in 1814, bequeathed all his cash, notes, and India bonds, to his executors, to be sold and invested in trust for his daughter (the wife of the defendant *Markham*) and her children, on the 24th of *March*, thinking himself near his end, sent for his solicitor, (the defendant *Jamson*) to make a codicil to his will, whose partner *Leeson* attended him, and prepared a codicil, by which the testator gave to the plaintiff *Mary Bunn*, otherwise *Clifton*, (who had for more than thirty years cohabited with him, and was the mother of the other plaintiff) 2000*l.* and to his and her daughter, the plaintiff, *Rebecca Clifton*, the like sum of 2000*l.* While the solicitor was in the house, the testator taking some keys from a basket which he always kept by his bed-side, delivered them to *John Bunn Clifton* (his son by the one, and the brother of the other plaintiff,) *Leeson*, and a tenant named Sandby, in whom he reposed great confidence, and directed them to go to an iron chest in which he kept his valuables, fixed in the wall of another room in his house, and to bring from it whatever property they found there. They brought three parcels, and laid them on his bed, one of which contained three India bonds, value 1500*l.* and bank notes, together of the value of 2225*l.*; another contained 1100*l.* in bank notes, and the other 479 guineas, the value of the whole being 3829*l.* The testator upon being informed that the amount was about 170*l.* short of 4000*l.* said it should be made up to 4000*l.* even money, and directed for the plaintiffs, 2000*l.* for each; but the complement was never in fact added. On the box which contained the 2225*l.* Mr. *Bunn Clifton* had before, on the 7th of *March*, by the testator's direction, written "For Mrs. and Miss *Clifton*, 504*l.*" The other two parcels, Mr. *Bunn Clifton*, by his father's direction, on the present occasion sealed up and wrote on them the words, "For Mrs. and Miss *Clifton*." The testator charged Mr. *Clifton*, that after his decease, he should deliver these to his mother and sister, the plaintiffs. Mr. *Clifton*, by his father's direction, replaced this property in the iron chest, locked it, and brought back the keys, which *Leeson*, by the testator's direction, sealed up in a paper parcel, and wrote thereon, "To be delivered to Mr. *Jamson* after Sir *Jervase Clifton's* decease." The keys were then again put into the basket, by the testator's bedside. The plaintiffs were not then in the house, but upon Mrs. *Clifton's* arrival some days after, the testator entrusted to her the keys of the iron chest, and told her that the contents were to be her's and her daughter's, and charged her to keep the keys; and many times afterwards, and particularly on the 27th of *April*, and on the occasion of his making a farther codicil, he declared that the money in the iron chest was for the plaintiffs. After this time, the testator frequently expressed anxiety respecting the keys of the iron chest, and required them to be shown him, and on learning that they had been obtained from Mrs. *Clifton* by his eldest son, he expressed great displeasure, and caused the keys to be replaced in the *basket*

of keys, which *was always kept in his bed-room.* The parcels and the property therein, continued in the same state until after the testator's decease, which happened a year afterwards. *Gibbs*, C. J. left to the consideration of the jury the probability that the intended 4000*l.* of which the testator had spoken, was the same sum designated by the codicil of the 24th of *March;* and also the question, whether the testator meant to make this an absolute gift to the plaintiffs, or only provisional, upon the probability that he might not survive long enough to complete the codicil. The jury found, that this was not the 4000*l.* designated by the codicil, and that the testator intended it as an absolute, and not a provisional gift. His lordship reserved the point, whether there had been in this instance such a delivery of the property as was sufficient to constitute a *donatio mortis causâ?* And the opinion of the Court of Common Pleas was thus delivered by *Gibbs*, C. J. "The two grounds on which the present application is made, have a different object in view. The one is, that the jury did not draw a correct conclusion from the facts submitted to them; the other is, to enter a nonsuit, on the ground that the facts, taking them to be proved, do not make out the title of the plaintiffs. The first question stands principally on the evidence of Mr. *Bunn Clifton.* If his memory has not failed him, the verdict is certainly right, and his credit and character stand unimpeached. As to the other points, it is agreed on all hands, that a *donatio mortis causâ* cannot exist without a delivery. The facts of this case are, that the property was taken out of a chest of the testator, looked over by him, and sealed up in three different parcels: being so sealed, he declares that it is *intended* for the witness's mother and sister, and directs *that it shall* be given to them after his decease; there is no other delivery but that: it is replaced in the same chest, and the keys are re-delivered to the testator, or by him to persons whom he always nominates as his servants for that effect, and he expresses a continual anxiety about the custody of the keys. The question is, whether this be a sufficient delivery to make a *donatio mortis causâ;* and we are clear that it is not. It is argued by the counsel for the plaintiffs, that there needs not to be a continuing possession in the donee, but that the donor may resume the possession without determining the gift. There is no case which decides that the donor may resume possession, and the *donatio* continue. *Smith* v. *Smith*(*p*) is a very confused case. Where the master died, does not appear; inasmuch as it is stated that the master delivered the key of his rooms to his servants when he went out of town; probably he died in the country, and then the delivery last made to his servant would be a continuing of possession up to his decease. But all the cases agree, that if the donor resume the possession, it ends the gift. Lord *Hardwicke* expressly so holds, in *Ward* v. *Turner*, where it suited the purpose of the counsel to argue, that if the donor, after making a complete delivery, receives back the article, the donation remains perfect. Lord *Hardwicke* immediately denied that proposition, and held, that if the possession of the donee do not continue, the gift is at an end. Seeing, therefore, that it is in the power of the donor at any time to revoke the donation before

(*p*) 2 Stra. 955.

his death, and that there must be a continuing possession of the donee after the delivery to the time of the donor's death; seeing too, here, that there is neither a delivery, nor a continuing possession, we are of opinion that no interest in this property passed to Mrs. and Miss *Clifton* under the supposed delivery to the son, for the use of his mother and sister; and that therefore a nonsuit must be entered."

In the last case was cited that of *Spratley* v. *Wilson*,(*q*) in which *Gibbs*, C. J. considered actual delivery unnecessary, holding the donation sufficient, where a person *in extremis*, said, "I have left my watch at Mr. *R's*, at *Charing Cross*, fetch it away, and I will make you a present of it." But his lordship desired that the case might not be mentioned, since immediately after the trial, he perceived that what he had improvidently thrown out, could not be maintained, because a delivery was wanting, and he had accordingly written a remark to that effect, at the end of his own note of the case. Again,

In *Miller* v. *Miller*,(*r*) the testator verbally gave to his wife, two days before his death, his coach and two horses, in the presence of three witnesses, but no delivery was made. Sir *Joseph Jekyll* decided that the gift was imperfect as a donation *mortis causâ*, since the subjects were not delivered during the life of the testator.

But although the act of delivery by the donor be complete, still it may be insufficient, from the nature of the property intended to be given, to entitle the donee to such property as a donation *mortis causâ*.

This may happen in instances of *symbolic* deliveries of possession. And it may be considered as settled, that where the thing delivered in lieu of the principal, in cases where the principal itself cannot be delivered in specie, is mere evidence of the subjects existence, and no property in it is transferred to the donee by the symbolic delivery, or at the utmost only a *right of action*, such a delivery, with a view to constitute a donation *mortis causâ*, cannot be established.

Upon this principle, Lord *Hardwicke* decided in *Ward* v. *Turner*(*s*) that delivery of *receipts* for South sea annuities, was not such a delivery of the annuities themselves of which they were capable, and that therefore the gift of them as an intended donation *mortis causa*, could not be supported. But he inclined to the opinion, that if a *transfer* of the annuities had been made to the donee the gift would have operated as such a donation. The case was in substance to the following effect:

W. as executor of *M.* claimed specific parts of the personal estate of *F.* and also *South Sea annuities* as donations *mortis causâ* made to *M.* in his life-time by *F.* The manner in which these gifts were proved to have been made, was as follows: "I give you *M.* those papers, which are *receipts* for South Sea annuities, and will serve you after I am dead." "I give you *M.* all the goods and plate in this house;" and a witness swore that *F.* declared to him and another person, who alone were present, that he *(F.)* gave to *M. all his household goods, money, arrears of rent, and every thing which should be found in his house, except his sword, gun and books.* Lord *Hardwicke* determined that the gift of the general personal estate of *F.* could not be supported, there being no pretence of any sort of delivery. And with respect to the *South Sea* annuities, his lordship,

(*q*) 1 Holt. 10. (*r*) 3 P. Will. 356. 358. (*s*) 2 Ves. sen. 431. see also 3 Madd. 185.

after taking a minute and accurate view of the *Roman* and *Civil* laws on this subject, and of all the cases then decided in the Court of Chancery, adjudged, that according to each law, delivery of the thing given, was necessary to an effectual donation *mortis causâ*, and therefore that the delivery of the receipts for *South Sea* annuities, was not such a delivery of the thing given, as to effectuate the gift, and compared it to the case of a mortgage where a separate receipt is given for the consideration money, in which case delivery of the receipt would not have been a good delivery of the possession, nor given the mortgage as a donation *mortis causâ* by force of that act. His lordship was therefore of opinion, that the gift of the *South Sea* annuities was merely *legatory*, and amounted to a *nuncupative* will, which was void by the Statute of Frauds and Perjuries. But he intimated that an actual transfer of the stock would have been sufficient to effectuate the intended donation.

So also in *Miller* v. *Miller*,(*t*) the delivery of a note for 100*l.* to the testator's wife, it being *neither a cash note, nor payable to bearer*, was held insufficient to pass to the donee the money as a donation *mortis causâ;* and upon this principle: that such a note was merely a *chose in action*, and must be sued for in the names of the executors, and that no property in it passed by the delivery.

A *check* which is a mere order for the payment of money, and only imparts by delivery an *authority* to receive the sum mentioned in it, cannot be the subject of a donation *mortis causâ;* for by the death of the donor the authority determines, and the right to the money becomes vested in the executor or administrator.(*u*)

It appears, however, that a check may be *so drawn* as to entitle the donee to it, after the drawer's death, in the nature of a donation *mortis causâ*.

Thus in *Lawson* v. *Lawson*,(*x*) *A.* during his last illness, drew a bill upon a goldsmith for the payment of 100*l.* to *B.* the wife of *A.* with a written *endorsement* that the money was "to buy her mourning," and the bill was delivered to *B.* It was determined that she was entitled to the money. The principle of the decision was considered by Lord *Rosslyn* to be this: "That taking the whole bill together it was an appointment of the money in the goldsmith's hands to the extent of 100*l.* for the particular purpose expressed in the written endorsement; a purpose which necessarily supposed the appointor's death."(*y*)

It seems that probate of the above bill was unnecessary,(*z*) for a gift when once declared to be a donation *mortis causâ*, or *in the nature* of one, takes effect from the delivery; so that the donee claims the subject as a gift from the donor in his life-time, and not under a testamentary act; and the appointment in the last case operated as a declaration of trust upon the executor of *A.*

Notwithstanding the necessity of delivery to constitute a donation *mortis causâ* made by *parol*, it is an unsettled question whether such kind of gift, appearing *in writing*, without delivery of the subject, can be supported. By the Roman and civil law a gift *mortis causâ* might be made in writing;(*a*) and in allusion to that law, as it is pre-

(*t*) 3 P. Will. 356. (*u*) 4 Bro. C.C. 291. (*x*) 1 P. Will. 441. (*y*) 2 Ves. jun. 121.
(*z*) 1 P. Will. 441. (*a*) Dig. lib. 39. tit. 6. l. 28. 2 Ves. sen. 440.

sumed, Lord *Rosslyn* in *Tate* v. *Hilbert*,(*b*) inclined to think that by the law of *England* such a donation might be made by deed or writing without delivery of the things contained in it. Lord *Hardwicke* also seems to have been of opinion, in *Ward* v. *Turner*,(*c*) and *Johnson* v. *Smith*,(*d*) that a gift *mortis causâ* might be by *deed* without actual delivery of its contents. But it must be noticed in regard to the *Roman* law, that it is so far only of authority as it has been received and allowed in this country; and it appears that the civil law has only been followed in cases upon the present subject so far as the donations were accompanied with delivery. That the Ecclesiastical Court has considered a deed or writing, made not in the form of a will, and continuing in possession of the deceased, testamentary, and therefore not operating as a gift *mortis causâ*, appears from two cases stated by Lord *Hardwicke* in *Ward* v. *Turner*.(*e*)

The first case was *Ousley* v. *Carrol*, in June 1722, in the Prerogative Court, before Dr. *Bettesworth*. A writing was left in the presence of three witnesses, not in the form of a will but a deed; *viz.* "I have given and granted, and give and grant to my five sisters and children of the sixth, their executors or administrators, *in case they survive me*, *all* my goods and chattels, and real and personal estate, and all which I may claim in right of my own, whether alive or dead." The dispute was by a person claiming as his wife (but who had been divorced) insisting that the above writing was no will but a deed of gift *mortis causâ*; and the Ecclesiastical Judge was of opinion, that it was *testamentary*; and probate was granted, from which there was no appeal.

The second case was *Shargold* v. *Shargold*, cited in the last, upon a *deed* of gift by Dr. *Pope* not to take place until his death; and six-pence was delivered by way of *symbol* to put the grantee in possession. The deed was pronounced for as a *will*, not as a donation *mortis causâ*.

That such instruments are considered testamentary by the temporal courts, and proper to be proved, appears from the case of *Rigden* v. *Vallier*,(*f*) and the authorities there referred to.(*g*) And it seems a consequence from the above observations that, as *probate* is not only unnecessary but improper in instances of valid gifts *mortis causâ*, such donations cannot be made by mere deed not delivered, nor by a writing referring to the donor's death unaccompanied by a delivery of the subjects of the gifts. Probably the law upon this subject may be stated to the following effect:

1. That since, without delivery, a donation *mortis causâ* made by *parol* would be imperfect, so it would be if made in writing without such tradition.

2. But that if the writing were a deed and *delivered* to the donee; then as delivery of a bond is a good donation *mortis causâ* of the money secured by it,(*h*) so it should seem that delivery of the deed would be an equally valid donation of the property contained in it. But that,

3. If the deed were kept in the possession of the donor, and so found at his death, not only a delivery in his lifetime would be want-

(*b*) 2 Ves. jun. 120. (*c*) 2 Ves. sen. 440. (*d*) 1 Ves. sen. 314. (*e*) 2 Ves. sen. 440.
(*f*) 2 Ves. sen. 252. (*g*) Ibid. 258. (*h*) See *infra*, p. 36.

ing, an act essential to this species of donation, but the deed as a deed would be defective; and no delivery of it having been made, the gift of course cannot relate to any such during the donor's life. The instrument, therefore, must of necessity be considered *testamentary* in order to give it any effect, and it cannot operate as a donation *mortis causa*. In such a case probate by the ecclesiastical court will be necessary.

If, however, from the nature of the instrument the property in it be capable of transfer by delivery, it is a consequence that such instrument may be the subject of a donation *mortis causâ*. Accordingly it has been determined that such a donation of *bank notes* is effectual.

This decision was made in the case of *Miller* v. *Miller*, before referred to; for there the testator, besides the gift to his wife of the note for 100*l.* which was neither a cash note nor payable to bearer as before observed,(*i*) gave to her two *bank* notes of 300*l.* each in the following manner: he took from his pocket book the notes, and gave them to his servant, directing him to deliver them to his wife, who was then present. Sir *Joseph Jekyll* decided that the bank notes were well given as a donation *mortis causâ*.

That case was followed by Lord *Thurlow* in *Hill* v. *Chapman*,(*k*) in which *A.* in 1779 delivered his will to *B.* (one of his executors, and a receiver of his rents,) declaring that there was something in it for him which would reward him for the trouble he *had* often given him, and also for the trouble he would have in the execution of the will *beyond* his co-executors, in consequence of his knowledge of *A's* affairs, to all of whom he had bequeathed equal legacies. At the time of the delivery of the will to *B.* there was pinned to it a note or paper addressed to *B.*, in which was inclosed a *bank note* of 50*l.* The will with the annexed paper and inclosure was frequently returned to *A.*, and as often re-delivered to *B.*; but at the last re-delivery, which was in *November* 1784, *A.* told *B.* that he had not done enough for him; and observed, that he had doubled the amount of what was inclosed in the paper. And on a subsequent occasion, *A.* said to *B.*, "Now I have made another will, the old will is of no use to me, but you must take care of it, by reason, you know, there is something with it for yourself; as soon as I am dead, open the paper and take it out." He also added, "that he (*A.*) gave it to him in that manner, to prevent his daughter knowing how much he gave him." When the will was *last* delivered to *B.* there was pinned to it a paper, directed "For *B.* the 8th of *November* 1784," which contained *two* bank notes of 50*l.* each, and the new will of *A.* to which he alluded as above, was dated the 15th of *January* 1785, and bequeathed to his executors 50*l.* a piece, one of whom was *B.*, and to whom *A.* gave the further sum of 10*l.* for mourning. The whole of this statement was made by *B.* before the master upon whose report it appeared, and the question was, whether *B.* was entitled to the two *bank* notes as a donation *mortis causâ*? and Lord *Thurlow*, C. said he thought the gift good as such donation.

It does not appear, from the report of the last case, whether the final delivery of the will and the paper billet annexed to it was dur-

(*i*) See *supra*, p. 32. (*k*) 2 Bro. C. C. 612. Ed. by *Belt*.

ing *A's* last illness; it must, however, be presumed to have been so, or the gift would be destitute of one of the essential requisites constituting a donation *mortis causâ.*(*l*)

Upon the same principle that bank notes are proper subjects for donations *mortis causâ*, it would seem that *government securities* for money will be so considered.

On this ground the opinion of the *Master of the Rolls* in *Jones* v. *Selby* (*m*) may be supported so far as regards the capability of a government tally to be the subject of a donation *mortis causâ*. Lord *Cowper*, on appeal from his Honour's decree, does not appear to have entertained a doubt, but that the tally was a fit subject for such a donation, though he reversed the judgment under the idea that the gift was not sufficiently proved, or if it had been so, that it was satisfied by the subsequent testamentary provision of the donor. The plaintiff in that case, was the relation and house-keeper of *C. M.* with whom she had lived upwards of twenty years. *C. M.* by his will, made in *March* 1702, gave to the plaintiff 500*l.*; and about two or three months afterwards, being desirous of increasing her fortune, and having a hair trunk in which were several things of value, *C. M.* sent for her, and in the presence of two of his servants spoke thus; "*I give to my cousin this hair trunk and all that is contained in it.*" He gave her the key, and bid the servant take notice and remember it; and it was proved in the cause that he, several times afterwards, inquired of his servants if they remembered the hair trunk, and once took a candle and showed it them, that they might remember it. Three years afterwards, *C. M.* made another will, *revoking* all former wills, and bequeathed to the plaintiff 1000*l.* but took no notice of the gift of the hair trunk, or any thing in it, and died. Four days after his death, upon opening the trunk, in the presence of several relations and other persons, there were found in it several rings, pieces of gold, and among other things, a *tally* upon the government for 500*l.* A suit being instituted by the plaintiff for the 500*l.* tally and the 1000*l.* the *Master of Rolls* decreed them to her; and on appeal from this decree it was contended for the appellant, that the gift being in the nature of a legacy and ambulatory, until the death of the testator, he by revoking all former wills, revoked also the gift, but if it were not to be so considered, then that the legacy of 1000*l.* was a satisfaction of the 500*l.* tally; and that the plaintiff should have proved that the tally was in the trunk at the time of the gift. Of this opinion was Lord *Cowper*, observing, "That these sorts of donations, especially where they were of the same kind with what was given by the will, ought to be fully proved in all the circumstances, otherwise they ought not to be countenanced, because it would open a way to perjury and fraud, greater than the statutes had provided against; that the plaintiff had not proved, by any one witness, that this tally was in the trunk at the time of the gift; that if it had been so, surely the testator, would, then, or when he had occasion so often afterwards, have told the witnesses of it; that it was strange he should bid them take notice of the trunk, and not mention the tally, which was the principal thing in it; that all the plaintiffs proved was its being there *when the trunk was opened*,

(*l*) See *Supra*, p. 25. (*m*) Prec. Ch. 300.

which was three years after the gift, and four days after the testator's death. That his lordship sat there to condemn frauds, and therefore might presume them unless they proved the contrary." The Court, however, considered the legacy of 1000*l.* a satisfaction of the 500*l.* tally, and therefore reversed the decree at the Rolls.

There seems to be another reason independently of the doctrine of satisfaction, which would have disappointed the delivery in this case as a donation *mortis causâ*, viz. that it was not made during the last illness of the testator, nor in the immediate peril of death; and it may be further observed, that there was no delivery of the trunk to the donee, but of the key only, so that it appears the delivery was incomplete, and the donation therefore imperfect.

The reason why *bank* notes may be the subjects of gifts *mortis causâ*, viz. that they are considered money, and not merely as representing money, and that the property in the money passes by their delivery, equally applies to *government* and *negotiable* securities under particular circumstances. Hence it is conceived that all negotiable instruments, which require nothing more than delivery to pass to the donee the money secured by them, may be the subjects of donations *mortis causâ*. That the delivery of *bank* notes has been so adjudged appears in a preceding page,(*n*) and there is no reason why *exchequer* notes,(*o*) or *promissory* notes *payable to bearer*,(*p*) or bills of exchange,(*q*) and *exchequer* bills(*r*) indorsed in *blank*, should not have the same capability; for in all those cases the *property* and the *possession* are inseparable; *i. e.* by delivery, the property passes to the donee.

The inference made in the remark upon the case of *Hill* v. *Chapman*(*s*) of the donation having been made *in prospectu mortis*, must be also observed in that next stated, which was the first case determining—

That bonds might be subjects of donations *mortis causâ*. The reasons for the decision as to bonds are these; that although a bond, which is a specialty, be a *chose in action*, and its principal value consists in the thing in action, yet some property is conveyed by the delivery. The law too allows it a *locality*, thereby making it capable of delivery. It is this locality that makes a bond *bona notabilia*, so as to render a prerogative administration necessary where the obligation is in one diocese and goods in another.(*t*) Under these circumstances, delivery of a bond as a donation *mortis causâ* is valid.

Thus in *Snellgrove* v. *Baily*,(*u*) a bond for 1000*l.* was given by *B.* to *C.* who delivered it to *D.* saying, "in case I die, it is your's, and then you have something." Lord *Hardwicke* determined that *D.* was entitled to the bond as a donation *mortis causâ*.

The above case was followed by that of *Gardner* v. *Parker*,(*x*) in which Sir *John Leach*, V. C. made a similar decision.

Since it is settled that bonds are capable of passing as donations *mortis causâ* by delivery, it should seem that the same principle would apply to the delivery of *mortgage deeds* by the mortgagee;

(*n*) See *supra*, p. 34. (*o*) 4 Barn & Ald. 9. (*p*) Ibid.
(*q*) *Collins* v. *Martin*, 1 Bos. & Pull. 648–651.
(*r*) *Wookey* v. *Pole*, 4 Barn. & Ald. 1. (*s*) See *supra*, p. 34.
(*t*) 2 Ves. sen. 442. (*u*) 3 Atk. 214. (*x*) 3 Madd. 184, and stated *supra*, p. 27.

for they are specialties, and *bona notabilia*, and it can hardly be contended that no property in the money secured passed by the delivery to the donee, when the contrary has been determined in instances of the delivery of bonds to the donees. That the delivery of mortgage deeds *mortis causâ* may be good, appears to be impliedly admitted by Lord *Hardwicke* in *Ward* v. *Turner*,(*y*) for he said, "Suppose the delivery had been of a mortgage, and a separate *receipt* had been taken for the money, *not* on the back of the deed, and the mortgagee had delivered such receipt to the donee, that would not have been a good delivery of the possession, nor given the mortgage *mortis causâ* by force of that act." Hence arises a natural inference from the case so put, that if the receipt had been indorsed on the deed, and the deed delivered to the donee *in prospectu mortis*, such a delivery would have entitled him to the money due on the mortgage, and to call upon the legal representative of the donor to clothe him with the legal title to empower him to recover the money from the mortgagor.(*z*)

In *Hassell* v. *Tynte*,(*a*) Lord *Hardwicke*, who seldom doubted, entertained scruples upon this point, and would not determine the question. This doubt originated upon the Statute of Frauds,(*b*) for he thought it uncertain whether an interest in lands could pass since that Act by a *parol* gift. But in answer it may be observed, that it is the property in the money (the principal) which passes by the gift and delivery, and that the donee, being so entitled, the heir of the donor is a trustee for him of the legal interest in the estate in mortgage.

It has been noticed that delivery of the thing given is indispensable to a valid donation *mortis causâ*,(*c*) yet it may be inferred from Lord *Hardwicke's* reasoning in *Ward* v. *Turner*,(*d*) that when the intended gift is incapable of delivery *in specie* from its size or quantity, delivery of the thing by which possession is to be obtained and the thing used, will be considered such a delivery of the subject itself, as with the other requisites will constitute a complete donation *mortis causâ;* for his lordship in distinguishing between the different effects of actual and symbolic delivery, thus expressed himself: "It never was imagined on the statute 21 James 1. (alluded to in the argument) that delivery of a mere symbol in the name of the thing would be sufficient to take it out of that act; yet delivery of the key of bulky goods, where wines, &c. are, has been allowed as delivery of the possession, because it is the *way* of coming at the possession or to make use of the thing. The key therefore is not a symbol, which would not do."

Since the preceding observations by the deceased author were written, the point contended for by him has been otherwise determined. In the case of *Duffield* v. *Elwes*,(*e*) *George Elwes* was possessed of a bond for 2927*l.* and had, also, a mortgage, created by a deed of even date with the bond, for securing the sum mentioned in the bond, and he had another mortgage for 30,000*l.* On the first of

(*y*) 2 Ves. sen. 443. (*z*) See 3 Madd. 185. also *Hurst* v. *Beach*, 5 Madd. 351. 355, a case determined since the above observations were written.
(*a*) Ambl. 318. (*b*) 29 Car. 2. c. 3. (*c*) See *supra*, p. 27.
(*d*) 2 Ves. sen. 443. and see the cases of *Bryson* v. *Brownrigg*, and *Bunn* v. *Markham*, *ante*, pp. 27 & 28. (*e*) Sim. & Stu. 1 v. p. 243.

September 1821, when he was on his death bed, so ill as to be unable to write, but of sound and disposing mind, in the presence of three persons as witnesses, he declared that he gave the bond and mortgages, and the money secured by them, to his daughter Mrs. *Duffield;* a written statement of this declaration was forthwith made, and signed by the three persons in whose presence the declaration was made. Very soon afterwards, on the same day, and in presence of the same persons, the mortgage deeds and bond were produced to the testator, and he was told what they were; on which he desired them to be delivered into the hands of Mrs. *Duffield;* they were accordingly delivered into her hand; and, whilst she held the deeds, he took her hands between his, in token of having completed the gift, and expressed satisfaction when he had done so. He died on the following day.

Arguments similar to those previously stated were urged in support of the gift. But the Vice Chancellor said, "The case of a bond I consider to be an exception, and not a rule. Property may pass without writing, either as a *donatio mortis causâ*, or by a nuncupative will, according to the forms required by the statute. The distinction between a *donatio mortis causâ*, and a nuncupative will is, that the first is claimed against the executor, and the other from the executor. Where delivery will not execute a complete gift *inter vivos*, it cannot create a *donatio mortis causâ*, because it will not prevent the property from vesting in the executors; and, as a court of equity will not, *inter vivos*, compel a party to complete his gift, so it will not compel the executor to complete the gift of his testator. The delivery of a mortgage deed cannot pass the property *inter vivos;* first, because the action for the money must still be in the name of the donor; and, secondly, because the mortgagor is not compellable to pay the money without having back the mortgaged estate, which can only pass by the deed of the mortgagee; and no court would compel the donor to complete his gift by executing such a deed.

"As to the case where a bond accompanied the mortgage deed, I was at first inclined to think that, as the bond alone, if it had been the only security for the debt, would, under the decisions, have passed as a *donatio mortis causâ*, so it would draw after it the mortgage, as being a collateral security for the same debt; but, upon further consideration, I think that the delivery of the bond, where there is also a mortgage, cannot be considered as a gift completed. The mortgagor has a right to resist the payment of the bond, without a re-conveyance of the estate; and it cannot be maintained that the donor of the bond would be compelled to complete his gift by such re-conveyance. The case of the Duchess of *Buccleuch* v. *Hoare*,(*f*) where I held, that a gift by will of an English bond was a gift also of a Scotch heritable security for the same debt, does not apply to this case. There the single question was, whether the gift of the English bond was not, within the intention of the testator, a gift of the debt, and did not necessarily carry with it all securities for the debt. The question here is, not as to the intention to give, but whether the gift *be completed*. I think the gifts were not

(*f*) 4 Madd. 467.

completed; and must declare, that there was no good *donatio mortis causâ* of these mortgages, even in the case where the mortgage was accompanied by a bond."

The next subject proposed to be considered is—

3. The Evidence admissible to prove the Donation, and the sufficiency of such Evidence.

It is a rule that a person cannot be allowed to give evidence in his own behalf; so that in general a gift *mortis causâ* must be proved by other evidence than that of the donee.

There is, however, an exception to this doctrine in instances where the donee is executor or administrator of the donor; for as a person in the character of executor or administrator is examined upon oath to charge himself with receipts of assets, he may so frame his examination as to make it operate in his discharge, which necessarily enables him to prove the manner of his becoming possessed of the property delivered to him as a donation *mortis causâ*. But to entitle the donee to such a discharge, it and the charge must be contained in the same *sentence*.(*g*)

Accordingly in *Blount* v. *Burrow*,(*h*) *A*. the donee was the executor of *B*. the donor, and being examined upon oath before a Master to charge himself with the receipt of four *India* bonds, he deposed to the following effect; "But this examinant saith, that the said testator on, &c. being about twelve days before his death, gave and delivered to the examinant four *India* bonds for 100*l*. each, for his (examinant's) use, to enable him to carry on and maintain a suit, &c. which was at the testator's death, and still is, depending, and therefore he claims the same." And the Court was of opinion that the examination was good evidence in discharge of *A*.

In *Tate* v. *Hilbert*,(*i*) the plaintiffs (donees) were relations of the testator. The defendant was the executor. The testimony of each plaintiff for the other was admitted to prove the donations. But Lord *Rosslyn* observed, "that to make a stretch to effect gifts made by persons surrounded by relations who give evidence for each other, would be attended with great inconvenience."

With respect to evidence sufficient to prove the requisites of a donation *mortis causâ*, it may be observed in general, that it is necessary to show the gift to have been made with a view to the death of the donor of a particular illness, or in consequence of some imminent peril, and also delivery of the subject to the donee. The necessity of the first requisite appears from the case of *Tate* v. *Hilbert*,(*k*) and of the second, from the cases below referred to.(*l*)

In *Blount* v. *Burrow*, as reported by Mr. *Vesey*,(*m*) *Eyre*, Ch. Bar. expressed an opinion, that if it did not appear from the evidence that the gift was made during the last illness of the donor, the donation, as one *mortis causâ*, could not be supported. But Mr. *Brown*,

(*g*) *Kirkpatrick* v. *Love*, Ambl. 589. and *Talbot* v. *Rutledge*, stated 4 Bro. C. C. 74.

(*h*) 1 Ves. jun. 546. 4 Bro. C. C. 72. See also *Hill* v. *Chapman*, 2 Bro. C. C. 612, *ante*, p. 34.

(*i*) 2 Ves. jun. 111.

(*k*) Ibid. 546. and see *Walter* v. *Hodge*, 2 Swanst. 100.

(*l*) *Bryson* v. *Brownrigg*, 9 Ves. 1. *Bunn* v. *Markham*, 7 Taunt. 224. *Ward* v. *Turner*, 2 Ves. sen. 431, and *Miller* v. *Miller*, 3. P. Will. 356.

(*m*) 1 Ves. jun. 546.

in his report of the same case, does not make the Chief Baron utter any such opinion.(*n*) The gift was made as we have seen, about twelve days before the donor's death; and because the written examination of the donee omitted to state that the gift was made during the last indisposition of the donor, the Court, according to Mr. *Vesey*, expressed the opinion before mentioned; and directed an issue to try whether the gift was a donation *mortis causâ*.

It must be observed, in relation to the last case, that prior and subsequent authorities appear in opposition to the opinion ascribed to the Chief Baron; for in *Lawson* v. *Lawson*,(*o*) *Miller* v. *Miller*,(*p*) *Hill* v. *Chapman*,(*q*) *Snellgrove* v. *Baily*,(*r*) and *Gardner* v. *Parker*,(*s*) no evidence appears to have been given of the gift or delivery of the subjects having been made during the last sickness of the donors, and yet the gifts were supported *mortis causâ*. The law upon this subject may probably be thus stated: When it appears that the donation was made whilst the donor was ill, and only a few days or weeks before his death, as in the cases last referred to, it will be presumed, in the absence of evidence, that the gift was made in contemplation of death, and in the donor's last illness; but when he for a long period survives the gift, then it seems that evidence will be required that the donor was not only seriously indisposed when he made the gift, but also that it was his last illness; for the time of the gift being so remote from the period of the donor's death, prevents the presumption before mentioned. In either case, however, if it appear from the evidence that the donation was not made with a view to the death of the donor, it cannot be supported as a gift *mortis causâ*.(*t*)

To the authorities before referred to may be added one of recent date, viz. *Walter* v. *Hodge*;(*u*) a case in which *Martha Hodge*, the wife and an executor of her husband, claimed 600*l*. the amount of bank notes, as a gift from her husband *mortis causâ*. The transaction detailed in her answer was, that the testator, shortly before his death, delivered to her a book containing those notes, and informed her that they were for her private use, and which he gave her to be at her own disposal; that she expended some of them before his death, and the rest were then in her possession. In addition to this, the evidence of *Alice Mason*, the wife's niece, was given before the Master, (upon whose testimony and the wife's answer he had not charged the latter with the 600*l*.) the effect of which was, that about eleven days before the testator's death, he, in the witness's presence, delivered to his wife a note-case containing some bank notes, (of the number of which she was ignorant,) telling her if any thing happened to him, the contents of the note-case were her's; and that on the same day the testator, on his return from the Bank of *England*, where he had gone to sell stock, gave to his wife, immediately after the delivery of the note-case, other bank notes, (of the amount of which the witness was also ignorant,) saying, "these are to be your's also;" upon which the wife put them into the note-case. *Alice* fur-

(*n*) 14 Bro. C. C. 72. (*o*) *Supra*, p. 32. (*p*) *Supra*, p. 31.
(*q*) *Supra*, p. 34. (*r*) *Supra*, 36. (*s*) *Supra*, p. 27.
(*t*) *Tate* v. *Hilbert*, 4 Bro. C. C. 291–294, and the cases referred to in the beginning of this section. (*u*) 2 Swanst. 92.

ther deposed to the testator being at the period of those gifts in an indifferent state of health, but not insensible to what he was doing, and that she understood the gifts to have been made to the wife for her own use conditionally, *viz.* in case of the testator's death. The question was, whether a donation *mortis causâ* had been sufficiently proved? And Sir *Thomas Plumer*, M. R. determined in the negative.

The reasons upon which his Honour came to such a conclusion were, first, from the difference between the statement in the answer and the evidence of *Alice Mason;* the one representing the gift of the whole to be an entire act, and the other as two distinct acts; the former stating the single act as a gift to commence *in præsenti*, while the latter, in contradiction, described the two gifts as made with a view to the donor's death. And secondly, because such contrary testimony (if *Mason's* evidence were admitted) prevented that clear and satisfactory evidence of the real nature of the gift or gifts, which is necessary to prove a donation *mortis causâ*. But his Honour was of opinion that *Mason's* testimony could not be received to establish a species of gift not put in issue by the answer; and he finally decided, that the evidence was insufficient to prove either a *donatio mortis causâ* or a donation *inter vivos:* not the former for the reason last mentioned, nor the latter, since it rested solely upon the wife's answer, which was contradicted by the testimony of *Alice Mason.*

The last thing to be considered is,—

III. What will defeat the donation, after it has been legally made.

Since the sole motive of making a donation *mortis causâ* is the expectation of speedy death, the law annexes a condition to the gift, that it shall be void if the donor recover from the disorder, or escape the peril which threatened his life. It follows, therefore, that the donor's recovery, or his escape from the danger, will defeat the gift; and he may resume the donation, or if prevented, recover it at law.(*x*)

The donee must either continue in possession of the subject from its first delivery till the death of the donor, or by re-delivery be in possession of it at that time; consequently, if the donor resume the possession and continue it until his decease, the gift will be revoked,(*y*) and for the following reason: the gift not being made to take effect immediately, but being inchoate, and depended on the event of the donor's death, *locus penitentiæ* was reserved to him, of which change of mind the resumption of possession being evidence, determined the donation.

But if the donor do not exercise his power of revocation previously to his death by a complete act, he cannot revoke it by a subsequent *will;* and upon this principle: that on the death of the donor, the title of the donee becomes, by relation, complete and absolute from the period of delivery in the life of the donor; and therefore incapable of revocation by an act which was inoperative before and only commenced at his death.(*z*)

Yet, although a gift *mortis causâ* cannot be revoked by the will of

(*x*) *Bunn* v. *Markham*, 7 Taunt. 224, stated *supra*, p. 28.
(*y*) 2 Ves. sen. 433. 7 Taunt. 232. (*z*) See *Jones* v. *Selby*, Pre. Ch. 300. 304.

the donor, it may be satisfied by a legacy given to the donee. Suppose, then, the donation were of a bond for 1000*l.* and by a subsequent will a legacy of equal amount was given generally to the donee, the latter would be satisfaction of the former, subject, however, to the donee's ability to prove that no satisfaction was intended. This was determined in *Jones* v. *Selby* before stated.(*a*)

The same principle which authorizes the application of the doctrine of satisfaction to those species of donation, equally applies to that of *election;* so that if the donation were of a bond, and the donor afterwards specifically bequeath it, and give by the same will a legacy to the donee, he must elect between the gift and the legacy.(*b*)

CHAPTER II.

Who may be a Legatee; and of the Descriptions of Legatees.

HAVING in the first chapter treated of a species of disposition, which is neither strictly a legacy, nor a gift *inter vivos*, but partaking of the nature of both; we now proceed to consider legacies strictly so called, confining our attention in the present chapter—

First,—To the persons capable of being legatees; and,

Secondly,—To the persons who take as legatees under certain modes of description.

Under the latter division it is proposed to consider—

SECT.

I. Legacies to legitimate children and grand-children.

1. *Where children living at the date of the Will, are entitled in exclusion of those afterwards born.*
2. *Where children living at the death of the testator, are entitled in exclusion of those after-born.*
3. *The right of a legitimate child in ventre sa mere.*
4. *When children living at the time the fund becomes distributable after the testator's death, are and are not entitled in exclusion of those after-born. And,*

First,—*When the division is postponed until a child or children attain 21; and*

Second,—*When the distribution is deferred during the life of a person in esse.*

5. *When a younger child considered an eldest.*
6. *When an eldest or only child considered a younger.*

SECT.

7. *When a child required to answer the description literally.*
8. *When the word "children" will and will not include grandchildren, &c.*
9. *When the words "children and grandchildren will and will not comprehend great grandchildren, &c.; and of the claims of grandchildren by marriage.*

II. Legacies to natural children.

1 & 2. *Effect of bequests to unborn natural children.*
3. *Capacity of natural children living at the date of the Will, to take under the description; and the evidence admissible in those cases.*

III. Legacies to "Heirs," who entitled.

1. *When next of kin.*
2. *When children.*
3. *When the heir.*

(*a*) See *Jones* v. *Selby*, Pre. Ch. 300. 304. *et supra*, p. 35.
(*b*) See *Johnson* v. *Smith*, 1 Ves. sen. 314.

SECT.
IV. Legacies to "Issues," who entitled.
1. *Grandchildren, &c.*
2. *When the issue of children only who were living at the date of the Will.*
3. *When restrained to children.*
V. Legacies to "Relations," who entitled.
1. *When restrained to next of kin, as where the bequest is—*
To relations generally; or
To near relations; or
To poor relations; or
To most necessitous relations.
2. *When the word relations will comprehend other relatives than next of kin; as—*
Where the legacy is given to poor as a permanent charity; or
Where the bequest is to poor or poorest relations, at the discretion of executors, &c. And the nature of such discretion; or
When the intention appears upon the will to include more distant relations than next of kin.
3. *When the word relations may not include all the next of kin; as—*
In bequests to my nearest relations or my nearest relation.
Construction of the term nearest relation.
Construction of the words nearest relation, of the name, or of the name and blood of the testator; and the effect of assuming the name by statute or royal licence.
4. *Whether relations by marriage are included in a bequest to relations.*
VI. Legacies to "Next of Kin."
1. *Who entitled under the description.*
2. *Whether relations by marriage.*
3. *As to distinction when the statute of distribution, or intestacy is or is not referred to in the bequest.*
VII. Legacies to "Personal Representatives" or "Legal personal Representatives."
SECT.
1. *When executors or administrators entitled under the description.*
2. *When next of kin.*
3. *When children; and*
4. *When a husband or wife.*
VIII. Construction of Bequests when limited to Executors and Administrators.
IX. Legacies to "Descendants."
X. The word "Family," who entitled under it.
1. *When the bequest is immediate and absolute.*
2. *When the bequest to family is connected with a power of appointment. And the different construction when the power is one of selection, and when not.*
XI. Legacies to "Nephews and Nieces."
XII. Legacies to "First end Second Cousins."
Construction of.
XIII. Legacies to "Government."
XIV. Legacies to "Servants."
1. *Who entitled under the description; and*
2. *Of parol evidence in this case.*
XV. Of the periods when the persons described by the terms "Family" or "Next of Kin" &c. must be *in esse* to take under the descriptions.
1. *When at the date of the will.*
2. *When at the death of the testator; and*
3. *When at the happening of an event subsequently to the testator's decease.*
XVI. When Legatees take *per capita*, or *per stirpes*, or *per capita et stirpes.*
1. *When per capita.*
2. *When per stirpes; and*
3. *When per capita et stirpes.*

SECT.
XVII. Effect of *mistakes* in the *names* of Legatees.
1. *When error in, or omission of name will be rectified by the description of the person or the context of the Will.*
2. *When mistake in name corrected by parol evidence.*
XVIII. Effect of *mistakes* in the *descriptions* of Legatees; and the admission of *parol evidence* in those cases.
1. *When the error in description rectified by the name.*
2. *When such error is occasioned by fraud, it will avoid the bequest.*
3. *When error in description corrected by parol evidence, and when*

SECT.
such evidence is inadmissible.
4. *When the evidence is insufficient, and the bequest void for uncertainty;* and
5. *When that evidence is insufficient, and the legacy established.*
XIX. Consequences of *imperfect descriptions* of, or *imperfect references* to, legatees *apparent* in Wills, and of the admission of *parol evidence* in these cases.
1. *Where a blank is left for a christian name.*
2. *Where a blank is left for the whole name.*
3. *When only the initials of a name are written.*

First,—Who may be a Legatee.

1. Every person is capable of being a legatee unless particularly disabled by the common law or by statutes. Some of the individuals so disabled are traitors(*a*) and artificers going abroad to use and teach their trades in foreign countries and not returning home after request so to do by the ambassador, &c.(*b*) Also persons neglecting to take the oaths prescribed by law, and to qualify themselves for offices which they accepted and exercised.(*c*) To whom may be added individuals *twice* convicted of denying the truth of the christian religion, or the divine authority of the Scriptures.(*d*)

Legatees who are attesting witnesses to wills devising freehold estates are not entitled to receive what was so intended for them, because the statute of *George* the Second(*e*) avoids the bequests, in order to restore the competency of such witnesses to support the wills, which would otherwise be defeated by the operation of the statute of frauds.(*f*) That statute requires wills of freehold property to be attested and subscribed by three or more *credible* witnesses: a description which is not considered applicable to a person who takes an interest under the instrument which he is made to attest in the character of a witness. But the Act of *George* the Second has been commonly understood not to extend to wills merely disposing of personal property; an understanding which now appears to have been founded in error; for Sir *William Grant*, determined in the case of *Lees* v. *Summorsgill*,(*g*) that a legacy given to a subscribing witness to a will bequeathing personal estate only, was an interest which such person could not legally claim, since the enacting clause of the above statute of *George* the Second applied to witnesses not only attesting the execution of wills of freehold estates, but to wit-

(*a*) 2 Black. Com. 512.
(*b*) 5 Geo. 1. chap. 27, sect. 3.
(*c*) 25 Char. 2. chap. 2. sect. 5. 1 Geo. 1. stat. 2. chap. 13. sect. 8.
(*d*) 9 & 10 Will. 3. chap. 32.
(*e*) 25 Geo. 2. chap. 6.
(*f*) 29 Char. 2. chap. 3. sect. 5.
(*g*) 17 Ves. 508.

nesses attesting the execution of "*any* will or codicil;" terms embracing within their import testaments disposing merely of personal property.

An uncertificated bankrupt may be a legatee, but the beneficial interest will belong to his assignees in trust for his creditors.(*h*)

A legacy of personal chattels to an alien *friend* is good since he may retain an interest in that species of property though he cannot hold real estates.(*i*) How far he may take money to arise by the sale of, or charged upon real estate does not appear to be expressly decided. A bequest of monies charged upon, or arising from the sale of real estate is considered, in many points of view, a devise of land itself; and in analogy to the decisions upon the mortmain acts and the statute of frauds, it should seem that the subject of such a bequest to an alien friend would be forfeited to the king, who, upon office found, would become entitled to recover it. If therefore lands were devised to trustees upon trust to sell, and subject to certain specific charges to pay the *residue* to an alien, the alien might, if such a devise were good, insist upon paying off the antecedent charges, and, that done, keep the estate itself; in such a case little doubt can be entertained but that a forfeiture would take place; but if the lands were only charged, amongst others, with a specific sum to an alien friend, or the trust of monies to arise by sale of lands were to pay such a sum to the alien friend so as not to entitle him to insist upon holding the estate itself after satisfying the other charges—*Quære*, whether the specific sum would be forfeited to the crown? See the analogy between the case above put and that of *Roper* v. *Radcliffe*,(*k*) and the marginal note to that case by the author of the abridgment.

A legacy of a mere personal chattel to an alien *enemy* will be forfeited to the king, and, as there must be an inquisition to entitle, if before the inquisition, a peace take place, it will discharge the cause of forfeiture and the alien may recover the legacy.(*l*) It should seem that the law would be the same in the case of a legacy to a natural born subject residing in an enemy's country and in allegiance with such enemies, for he would be considered as an alien enemy.(*m*)

SECOND,—Of the description of Legatees.

SECT. I. Legacies to Legitimate children.

1. Where children living at the date of the Will are entitled in exclusion of those afterwards born.

When it appears from express declaration, or a clear inference arising upon the face of a will, that a testator in giving a legacy to a class of individuals generally intended to apply the terms used by him to such persons only as answered the description at the date of the instrument, those individuals alone will be entitled, although if no such intention had been expressed or appeared in the will, every person falling within the class at the testator's death would have been included in the terms of the bequest.

(*h*) Ex-parte *Ansell*, 19 Ves. 208. (*i*) *Calvin's* case, 7 Co. Rep. 17.
(*k*) Cited in 5 Bacon. abt. title Papists, C. 7, last edition, p. 278.
(*l*) *Attorney Gen.* v. *Weedon*, Parker's Rep. 267. (*m*) 3 Bos. & Pul. 114.

Accordingly in *Christopherson* v. *Naylor*,(*n*) the bequest was "to each and every of the child and children of my brother and sisters, *John*, *Esther*, *Martha*, and *Tamar Turnbull*, which shall be living at the time of my decease, except my nephew *F. F.*;" for whom he had otherwise provided. "But if any child or children of my said brother and sisters, or any of them [besides the said *F. F.* my nephew] shall happen to die in my lifetime, and leave any issue living at, or born in due time after his, her, or their decease, then the legacy or legacies intended for such child or children so dying, shall be in trust for his, her, or their issue; such issue taking only the legacy or legacies which the parent or parents would have been entitled to, *if living at my decease.*" *Martha* died during the life of the testator, leaving three children, all of whom died before the testator made his will, *leaving issue*, who claimed in right of their parents to participate in the bequest. The validity of the demand depended upon the question, whether the circumstance of the children not having been alive at the date of the will excluded their issue from any shares of the legacies. And it was determined by Sir *William Grant*, M. R. that the issue were not entitled, as none but children of the brother and sisters, who were living at the *date* of the will, had any interest in the bequest. Those children alone were the *primary* legatees, and the bequest to issue was merely intended in *substitution* of such children, an intention which necessarily excluded the issue of children who were dead when the will was made.

It is to be remarked, that the last was a case in which the testator did not stand in the relation of parent to the legatees; for when a testator is clothed with that character, it being his duty to provide for his children at his death, a court of equity presumes that he intended to do so by his testament; it will therefore give effect to the supposed intention in laying hold of any general expressions which include all children, notwithstanding it be apparent from the context that only children in existence when the will was made were within contemplation of the testator. Yet even between parent and child, if it be evident that he really forgot that he might have other children than those living at the date of his will, and has upon the face of that instrument made provision for such of them as were then in existence, and omits those to be born in future, it is impossible to supply that defect and to give them any provision, however desirous the court may be to do so.(*o*)

In *Matchwick* v. *Cock*,(*p*) *James Matchwick* having one son and two daughters, devised all his real personal estates to trustees, to apply at their discretion the whole or part of the annual produce of the net surplus of both funds for the support of his wife, and the maintenance and education of *his children* until his wife's death or second marriage, in which latter event, the provision for her support was to cease, and the whole yearly produce to be applied for the maintenance and education of *his children*. The testator then authorized his trustees to advance a premium to apprentice *his son Thomas*, or to apply part of the trust funds for the advancement of *either* of his daughters, with a direction to convey, upon his wife's death, a house and lands

(*n*) 1 Meriv. 320. and see 3 Ves. 611. (*o*) 3 Ves. 611. (*p*) 3 Ves. 609.

to his *said son* in fee, and on the same event to pay to *each and every of his daughters* who might be then living 1000*l.* unless they or *either* of them should have been previously advanced by the trustees, and then only so much as would make the portion of *either* of his daughters 1000*l.* The trustees were also directed at the time last-mentioned to deliver to *his children* all his household goods, &c. and to assign and deliver to his *said son* all the rest of his property, regard being paid to the *minority of his children*, so as not to invest *them* with any of it before the age of twenty-one. In addition to the three children in existence when the will was made, the testator left two sons; and the question was, whether they were entitled with their brother and sisters to the provision of maintenance during the life of the wife, which depended upon this, whether that provision was confined to children in *esse* at the date of the will? And Lord *Alvanley*, M. R. decided in favour of the after-born sons, upon the principle before stated, and would not permit the general expression "his children" to be narrowed by the context. He observed, that if it were not the case of *parent and child*, the inference must be made that the testator only intended to provide for his eldest son and two daughters; and his Honour remarked the impossibility under the will to admit after-born sons to a share of the residue, or to give them the sums provided for daughters.

Next followed the case of *Freemantle* v. *Taylor*,(*q*) in which Sir *William Grant*, upon the weight of the last authority, made a like decree under similar circumstances.

If, however, the intention of a testator be clear to confine his bounty to those children only who are living at the making of his will, that intention must prevail (as before observed) to the exclusion of children afterwards born. So that if *A.* bequeath 1000*l.* to the children of *B. now* living;(*r*) or to the *three* children of *B.* (who has that number at the date of the will) and another child is born to him before the death of the testator, it cannot participate in the legacy; because it is manifest that the *three* children in existence when the will was made, were the only persons designed to take the 1000*l.*;(*s*) and the fourth child does not answer the description in the will, so that if one of the three died shortly after the date of the instrument, the *fourth* child could not be permitted to stand in his place.

Thus in *Sherer* v. *Bishop*,(*t*) *Nicholas Fayting* gave a legacy of 3000*l.* stock to be divided between the *six* children of *John Sherer* and *Mary* his wife, at their ages of twenty-one, &c. When the will was made, there were *six* children living, and a *seventh* was born during the life of the testator, of whom he took no notice in two codicils which he afterwards added to his will. And it was determined against the claim of the after-born child, since it was apparent that the testator meant only to provide for the *six* children of *John* and *Mary Sherer*, who were in *esse* when he made his will, and literally answered the description of the bequest.

It is a consequence of the *seventh* child not answering the description in the will, that it could not be let in to take a share of the legacy, although one of the six children should die before the testa-

(*q*) 15 Ves. 363. (*r*) Ambl. 397. (*s*) 2 Cox, 191. (*t*) 4 Bro. C. C. 55.

tor. (*u*) And for the same reason the re-publication of the will by the codicils, could not remove the original objection, since, although the will speaks as well from the dates of the codicils as from its own date, yet the difficulty remains, viz. how a *seventh* child can possibly take a share in a legacy given by will to *six* only in existence at its date.

The case, however, would be different (as appears from that of *Sherer* v. *Bishop*, before in part stated) if the bequest in the will had been to the children of *John* and *Mary Sherer*, living at the date of it, without mentioning any number, for then the will, being made to speak from the making of the last codicil, and after the seventh child was born, that child answers the description of the bequest, which ought to be read, "to the children of *John* and *Mary Sherer* living at the date of the *codicil*."

A Court of Equity, indeed, uses all possible ingenuity in construing testamentary expressions in such a manner as to include all children in existence at the testator's death. To this practice may be attributed the decision of the case next stated, in which the words "to every child that *A. hath* by his wife," had the same effect given to them as if the expressions had been "to every child that *A. shall have* by his wife at my decease." In ordinary acceptation, the word "hath," is applicable to objects in existence, but the Court thought it might consistently with its habit, and the intention of the testator, give a prospective sense to the term, in order to include the children of *A.* living at the death of the testator.

The case alluded to is, *Ringrose* v. *Bramham*,(*x*) in which the testator bequeathed to *Joseph Ringrose's* children 50*l.* "to every child *he hath* by his wife *Elizabeth*," to be paid at twenty-one, with interest in the meantime. A legacy of 50*l.* was also given in similar terms to *Christopher Rhodes's* children. There were *eleven* children of *Ringrose* and *Rhodes's* living at the date of the will; other three were afterwards born, and alive at the death of the testator. And it was decided by the *Master of the Rolls*, that the three were entitled with the eleven children to legacies of 50*l.* each, his Honour remarking, that he might fairly construe the word *hath*, so as to make it speak at the time the will took effect, and let in the children born between the making of the instrument and the death of the testator.

With the case last stated, we shall close the first subdivision, and proceed to consider—

2. When children living *at the death* of the testator, are entitled to the fund bequeathed to children, in exclusion of those after-born.

Where a legacy is given to a descript class of individuals, as to children, in general terms, and no period is appointed for the distribution of it; the legacy is due at the death of the testator; the payment of it being merely postponed to the end of a year after that event, for the convenience of the executor or administrator in administering the assets. The rights therefore of legatees are finally settled and determined at the testator's decease.(*y*) Upon this principle is founded the well established rule, that children in existence at that period, or legally considered so to be, are alone entitled to participate in the bequest. As an example of this:

(*u*) 3 Bro. C. C. 148. (*x*) 2 Cox. 384. (*y*) 1 Ball & Beat. 459.

The testator bequeathed his goods and chattels to two persons to pay debts, and the residue to be employed for the benefit of their children, by the testator's daughters, *A.* and *B.* in equal shares. The daughters had children born *before* the will was made, some *afterwards* and before the testator's death; and others after that event. The question was, which of those children should take? And the Lord *Chancellor* determined that the division of the property was to take place at the death of the testator, and for that reason all the children born during the testator's life, were entitled, in exclusion of those born after his decease.(*z*)

So in *Viner* v. *Francis*,(*a*) the bequest was "to the children of *my late sister Mary Crowser*, I give the sum of 1000*l.* to be equally divided among them." *Mary* had three children living when the will was made, one of them named *William*, died before the testator; so that if the terms of the bequest to children were to be construed to include those children only who were living at the date of the will, *William's* share would have lapsed. But if those terms were to be construed to include children who should be living at the death of the testator, the entire fund would belong to the two children who were then in existence, and answered the description of children of *Mary*.(*b*) In support of the first point, it was contended that the bequest to the children "*of my late sister*," was equivalent to a gift to them, *nominatim*, or was the same as if the testator had used the words, "to the *three* children of my late sister *Mary*." But the *Master of the Rolls* was of a different opinion, and declared in favour of the two survivors, upon the principle, that where a person bequeaths property among his own children generally, he is presumed to mean among such of them as shall be living at his death; a presumption equally applicable in the present instance.

It will make no difference as to the application of the rule, although the terms of the bequest be prospective, and no particular time of payment is mentioned; for the fund will nevertheless be divisible at the testator's death, which necessarily excludes after-born children. If then a legacy were given "to the children of my daughter *Mary*, begotten or *to be* begotten," as in the case of *Sprackling* v. *Rainer*;(*c*) children coming into existence after the death of the testator would be excluded.

The last are cases of simple unqualified bequests to children: And the rule which we have seen to apply to them, holds equally where the gift is general to children, with a condition annexed to it disposing of a child's share upon its dying under the age of twenty-one. The principle is this: The legacy being immediate to children, the period of vesting and *division* unite at the same point; *viz.* the death of the testator; whence it follows, that a child born after the happening of such event, must be excluded.

Accordingly in *Davidson* v. *Dallas*,(*d*) the bequest was of 3000*l.* to the children of the testator's brother *Robert Davidson*; and if

(*z*) *Roberts* v. *Higman*, 1 Bro. C. C. 532, in notes; and see *Heathe* v. *Heathe*, 2 Atk. 122. *Coleman* v. *Seymour*, 1 Ves. sen. 209.
(*a*) 2 Bro. C. C. 658. 2 Cox, 190, *S. C.* (*b*) See *infra*, chap. 8, sect. 4.
(*c*) 1 Dick. 344. (*d*) 14 Ves. 576, and see *Scott* v. *Harwood*, 5 Madd. 332.

either of them died under the age of twenty-one, the share was to go to the survivors. Six children of *Robert* were living at the death of the testator, and other two were afterwards born. The question was, whether, as the eldest child had not attained twenty-one, (the *supposed* period for division of the fund,) the two after-born children were not entitled to parts of it. And Lord *Eldon* determined in the negative for the reason before-mentioned.

It is to be noticed in relation to the above case, that the distribution of the legacy was not actually deferred until the children attained twenty-one, a circumstance which makes it an exception to that class of cases, after considered, in which children coming into *esse* between the death of a testator, and the period of the eldest or youngest child attaining twenty-one (the time when the fund was made divisible) have been allowed to partake of it.

The principle which excludes children born after the testator's death when the fund is distributable at that period, will also prevent such children taking shares, notwithstanding the testator has directed part of it to be appropriated to secure the payment of annuities, which for that reason cannot be divided at his decease with the remainder. For although where the interest of a sum of money is bequeathed to *A.* for life, and the capital at his death to the children of *B. all* the children of the latter, born in the life-time of *A.* will be entitled, (and not those only in existence at the death of the testator, as will afterwards appear;) yet in the present case, as the appropriation operates as a mere temporary separation of a part of the fund to answer a particular object, and is no impediment to the division of the remainder at the death of the testator, (the time when the whole would unquestionably have been distributable if no such appropriation of a portion of it had been directed,) the money, so set apart to answer the particular purpose, must follow and belong to the persons entitled to the property out of which it was taken, those persons being such of the children of *B.* as were living at the death of the testator. The following is an authority in confirmation of these remarks:

In *Hill* v. *Chapman*(*e*) the testator gave specific legacies in trust for all the children of his daughter, *Sarah* by name, and then in existence, to sons at twenty-three, and to daughters at twenty-one, with intermediate interest for their education, directing the surplus to accumulate for the benefit of the legatees, until it became divisible, with benefit of survivorship. He then proceeded to give the residue of his estate in trust for *all* his grand-children by his said daughter, to be applied for their benefit "as aforesaid." The testator afterwards gave by a codicil some annuities for life, directing 1000*l.* to be appropriated to answer them. A grand-child born after the death of the testator, and in the life time of the annuitants, claimed a share of the funds, which was attempted to be supported on the circumstance of the 1000*l.* not being distributable while the annuitants were alive; whence it was contended that the effect of the appropriation was to let in the after-born child not only to a share of the 1000*l.* but also to a share of the residue; and it was admitted

(*e*) 1 Ves. jun. 405. 3 Bro. C. C. 391. *S. C.* ed. by *Belt;* and see *Singleton* v. *Gilbert*, 1 Cox, 68.

on the part of the grand-child, that the phrase "as aforesaid," could not by any thing to which it was applicable, have the effect of postponing the distribution of the residue to a period beyond the testator's death. And Lord *Thurlow*, C. decreed against the claim of the grand-child, declaring that the whole residue was divisible at the death of the testator; and that since grand-children only who were living at that time were entitled, they alone could claim whatever should form part of it, as the 1000*l.* would do upon the deaths of the annuitants. And his Lordship observed, it would be repugnant to say that one part of the residue so given should go one way, and the other part (1000*l.*) another.

Although such be the general rule in regard to the exclusion of children born after the testator's death, it is yet subject to alteration from the intention of a testator appearing upon the face of his will. If then the intention be manifest, (though not so directly expressed in words) to include all the children of a particular person, that intention will prevail, notwithstanding the terms of the gift would not alone let in after-born children. The distribution, therefore, will in such cases be deferred, in order to let in *all* children, whensoever born, to take shares of the fund.

An instance of this kind occurred under Mr. *Shepherd's* will(*f*) by which he devised the residue of his real and personal estates to such child or children as his daughter *Frdnces Gibson should have*, whether male or female, in equal shares, (a devise, which, as we have seen, would not have permitted children coming in *esse* after the testator's death to have taken shares of the fund.) The testator then declared, that *if his daughter should die without such issue*, the residue should go to *C. Jefferson* and *Joseph Pike*, in equal proportions. By a codicil, he substituted *Samuel Shepherd* in the place of Mr. *Jefferson*, and devised to them the residue in common for life, in the event of his daughter's death, *without leaving issue*, but if she *left* any child or children, he directed that as certain annuities he had given by his will fell in, they should be divided among *such* children. It appears to have been the opinions of Lords *Hardwicke* and *Northington*, that *all* the children of Mrs. *Gibson* which she might leave at her death would be entitled.

The ground of their Lordships' opinions must have been, that since the words of the bequest were sufficient to include all the children of Mrs. *Gibson*, and his intention to do so was clear, from the ultimate disposition of the fund upon the contingency of Mrs. *Gibson's* death *without leaving* any child, that intention was to be performed, which necessarily postponed the final distribution of the property until the determination of Mrs. *Gibson's* life. If, indeed, it had been decided that children coming in *esse* after the testator's death were excluded, this strange effect might have been produced; if Mrs. *Gibson* happened to have no child living when the testator died, but had children at her decease, although they could not take any thing, yet their existence would have prevented the limitation ever taking effect, since it depended upon Mrs. *Gibson's* death without leaving a

(*f*) *Shepherd* v. *Ingram*, Ambl. 448. 1 Ves. sen. 485. by the names of *Gibson* v. *Rogers*.

child. Such a construction, therefore, would have made the testator die intestate.(*g*)

3. The question, whether a child in *ventre sa mere* can take a share in a fund bequeathed to children under a general description of "children," or of "children living at the testator's death," does not appear to have been finally settled previous to the decision of the Court of *Common Pleas* in favour of the child, in the case of *Doe* v. *Clarke*,(*h*) sent out of *Chancery* for the opinion of the Judges, and which case was to the following effect:

The testator devised the premises in question to his *brother Henry Clarke* for life, remainder "to the use of all and every such child or children, whether male or female, of his *brother Henry* as should be living at the time of his decease, other than and except *B.* his (the testator's) niece, as tenants in common," &c. *Henry Clarke*, after surviving the testator, left at his death three daughters, and his wife pregnant with another daughter, who was born. The question was, whether the daughter in *ventre sa mere* at the death of her father, *Henry Clarke*, was entitled with her sisters, under the description in the will, as a *child living* at *Henry's* decease? And *Eyre*, C. J. said, "I have no doubt on any view of this case. It is plain, from the words of the will, that the testator meant that all the children whom his brother should leave behind him should be benefited: but *independent of this intention*, I hold, that an infant in *ventre sa mere*, who by the order and course of nature *is living*, comes clearly within the description of "children living at the time of his decease." The remarks of *Buller*, J. were, "In equity there are two classes of cases upon the present subject: the first, where the bequest is in the nature of a portion or provision for children, and there an after-born child takes his share with the rest; of which class is the case of *Millar* v. *Turner*.(*i*) The second, where the bequest arises from some motives of personal affection; and there it is confined to children actually in existence. Of this second class was the case of *Cooper* v. *Forbes*;(*k*) which therefore makes a striking difference between that and the present case. Here the bequest is not confined to children living at the death of the testator, but it is kept open till the death of his brother. It seems, indeed, now settled, that an infant *en ventre sa mere* shall be considered, generally speaking, as born for all purposes *for its own benefit*."(*l*) In reply, the *Chief Justice* observed, that the two classes of cases in equity proceeded on a distinction which had always appeared to him extremely unsatisfactory, and unfit to be the ground of any decision whatever.

It seems that the above decision of the Court of *Common Pleas*, and the approval of it by the Court of *Chancery*, have shaken the authority of the second class of cases referred to. It was truly observed, that the distinction made by the cases in equity, when a lega-

(*g*) See the cases of *Mills* v. *Norris*, 5 Ves. 335. and *Defflis* v. *Goldschmidt*, 1 Meriv. 417. stated *infra*, p. 59.

(*h*) 2 H. Blackst. Rep. C. P. 399. 2 Bro. C. C. 320. 2 Ves. jun. 673. *S. C.*

(*i*) 1 Ves. sen. 85. and see *Beale* v. *Beale*, and *Northey* v. *Strange*, 1 P. Will. 244. 341.

(*k*) 2 Bro. C. C. 63; and see *Ellison* v. *Airey*, 1 Ves. sen. 111. *Bennett* v. *Honeywood*, Ambl. 708. 711. and *Pierson* v. *Garnet*, 2 Bro. C. C. 38.

(*l*) See *Doe* v. *Lancashire*. 5 T. R. 49.

cy is given to children as a *portion*, and when as a *bounty*, in regard to the admission or non-admission of a posthumous child to a share in the bequest, is too subtle and unsatisfactory. For when it is considered how very inconsistent with probability it is, that when a person bequeaths a legacy in such general terms as to "children," or "to the children of *A.* living at *A's* death," he should intend those only to take who might be actually born at *A's* decease, and that a child in *ventre sa mere* should be excluded merely because it happened not to come into existence until a few days or weeks after *A's* death, it becomes a subject of surprise, how such a distinction as we find in the cases should have ever prevailed. Besides, the construction that a child *en ventre sa mere* might take under so general a description, was offering no violation to any rule of law, as in most instances the law considers a posthumous child, the same as if it had been born before the death of its father. A devise to it is good.(*m*) It may be vouched in a recovery, although for the purpose of answering over in value.(*n*) It may be the subject of murder.(*o*) It may take under the statute of distribution as a child living at the intestate's death.(*p*) It may be entitled to the benefit of a charge for raising portions for children living at the death of the testator.(*q*) An injunction may be obtained on its behalf to stop the commission of waste.(*r*) It will prevent a remainder from taking effect which depends upon the death of its father without leaving issue.(*s*) A limitation to it for life, with remainder to its first and other sons successively in tail, will, as it seems, be a good limitation; which could not be so, unless a posthumous child were considered in law a child in *esse*.(*t*) Upon the whole it appears to be a right conclusion, that there is no solid reason why a child in *ventre sa mere* should not be considered generally as in existence. Modern authorities, and the solemn declarations of Judges in them, and in other cases, are sufficient to authorize the proposition, "that posthumous children are entitled to all the privileges and advantages which they would have enjoyed if they had been actually born at the time their rights accrued."

In accordance with such proposition, the case of *Rawlins* v. *Rawlins*,(*u*) was determined. There the testator, after providing for his daughter, bequeathed "to each and every of his other children then born, or thereafter to be born, and who *should be living at the time of his decease*, 5000*l.* a piece, &c. The only question was, whether a child *en ventre sa mere* at the death of the testator, and born seven months afterwards was entitled? And the *Chancellor* decided in the affirmative upon the authority of the before stated case of *Doe* v. *Clarke*.

Since the preceding observations were written, it has been decided, that a child *en ventre sa mere* is entitled under the description of a child *born* at the testator's death. In the case alluded to, the testator bequeathed a legacy upon trust for all the children of *A.*

(*m*) *Scatterwood* v. *Edge*, 1 Salk. 229. (*n*) 1 Inst. 390, a. (*o*) 3 Inst. 50, 51.
(*p*) *Edwards* v. *Freeman*, 2 P. Will. 446. *Wallis* v. *Hodson*, 2 Atk. 114.
(*q*) *Hale* v. *Hale*, Pre. ch. 50. (*r*) *Musgrave* v. *Perry*, 2 Vern. 710.
(*s*) *Burdet* v. *Hopegood*, 1 P. Will. 487.
(*t*) *Long* v. *Blackall*, 3 Ves. 486. 7 Term Rep. 100. *S. C.* and per *Buller*, J. *Thellusson* v. *Woodford*, 4 Ves. 322. (*u*) 2 Cox, 425.

"born in my life-time." And his Honour the Vice Chancellor decided, that a child of which *A.* was *enceinte* at the testator's death, was entitled to a share.(*x*)

The right of a posthumous child in a fund bequeathed to "children" cannot be disputed, when the period of *division* is deferred *beyond* the testator's death, and the child is born *before* that time arrives. We shall therefore next consider—

4. When children living at the time the fund becomes distributable *after* the testator's death, are and are not entitled in exclusion of those born subsequently to that event.

It is now settled, that when legacies are given to a class of individuals generally, payable at a future period, as to the children of *B.* when the youngest shall attain the age of twenty-one; or to be divided among them upon the death of *C.* any child who can entitle itself under the description at the time when the fund is to be *divided*, may claim a share, viz. as well children living at the period of distribution, although not born till after the testator's death, as those born before, and living at the happening of that event. This rule is founded upon the anxiety of a Court of Equity, to effectuate the intention of testators in providing for as many children as possible with convenience. It therefore does not unalterably confine the number to the time when the interests vest, which in general is at the death of the testator, but prolongs the period to the happening of an event upon which a determinate share of the fund becomes payable.(*y*) The following cases will confirm the preceding remarks; but which it will be convenient to consider under the following heads: First, when the division is postponed until the children attain a particular age; and secondly, when the distribution is deferred till the death of a particular person. And,

First, when the division of the fund is postponed until a child or children attain a particular age.

If a legacy be given to the children of *A.* at the age of twenty-one, in that case, so soon as the eldest arrives at that period, the fund is distributable among so many as are in existence at that time; and no child born afterwards can be admitted to a share, because the period of division fixes the number of the legatees. Distribution is then made, and nothing remains for future partition.(*z*)

In *Gilmore* v. *Severn*,(*a*) the testator bequeathed to the children of his sister *Jane*, 350*l.* with interest, to be paid equally amongst them as they severally attained twenty-one, with benefit of survivorship. *Jane* had two children at the testator's death; another child was afterwards born during the infancy of the other two; and the Court was of opinion that since the after-born child came into existence before the *eldest* attained twenty-one, it was entitled to a share of the legacy.

And in *Prescott* v. *Long*,(*b*) the Court ordered the share of a child to be paid who had attained the age of twenty-one, the rest being

(*x*) *Trower* v. *Butts*, 1 Sim. & Stu. 181. For cases of real estate, see *Whitelock* v. *Heddon*, 1 B. & P. 243. and *Lancashire* v. *Lancashire*, 5 T. R. 49.

(*y*) 1 Ball & Beat, 459.

(*z*) 1 Ball & Beat. 459–483. *Andrews* v. *Partington*, 3 Bro. C. C. 402. See also, *Curtis* v. *Curtis*, 6 Mad. 14.

(*a*) 1 Bro. C. C. 582, ed. by *Belt*. (*b*) 2 Ves. jun. 690.

infants; the effect of which would be to exclude after-born children.

In that case, the bequest was to trustees of 15,000*l.* for the testator's grandsons *George*, *Charles*, and *Thomas*, and his grand-daughters, *Augusta* and *Sophia*, (the five children of his son *Thomas Prescott*) and all the children of his said son equally. The shares of sons to be paid at twenty-one, and of daughters at that age or marriage, with consent: *George* having attained the age required, the Court at his suit ordered his share to be immediately paid to him, the period for the final division of the fund having arrived.

So in *Hoste* v. *Pratt*,(*c*) the testator, after directing a sale of his real and personal estates, and payment of debts, &c. gave the remainder of the proceeds and money to trustees, to place at interest and apply a sufficient part of it for the maintenance and education of *all* the children of *Dixon Hoste* and wife, until they attained the ages of *sixteen*, at which times they were to receive the capital equally. There were nine children, some of whom were born after the eldest child attained his age of sixteen. And the Court determined that those after-born children were excluded from participating in the residue, since they were not in *esse* when the fund was to be divided, viz. when the eldest child attained the age of sixteen; and the Chancellor remarked, that such construction was an extremely convenient one.

If, however, the period appointed by a testator for the distribution of the fund, be such as to admit of all children, whenever born, that a particular person may have, they will be entitled; for the rule before stated, is not infringed upon in this instance. Thus, if the bequest be to all the children of *B.* to be paid when the *youngest* attains the age of twenty-one; the period of distribution being postponed until the youngest child which *B.* may ever have, shall arrive at that age, necessarily and properly lets in all the children of *B.*

This was determined in the case of *Hughes* v. *Hughes*,(*d*) in which the testator devised the residue of the rents and interest of his real and personal estates, in trust, for the maintenance and education of *all* the children of his three daughters, *Rebecca*, *Susanna*, and *Devereux*, equally until the *youngest* of his said grand-children attained twenty-one; and in the event of any of them dying before that period, leaving legitimate children, such children were to be entitled to the shares of their parents. And *when such youngest grandchild attained twenty-one*, the testator gave a share of the capital to such his grand-children as should be *then* living, and to the children of such as should be *then* dead. At the testator's death, *Devereux* had six children, and another child was afterwards born. *Rebecca* had only one when the testator died; but another afterwards. And *Susanna* had four children at the testator's death, and two more after that event. The question was, whether the children born after the decease of the testator, should participate in the fund with those in *esse* at that period? And Lord *Thurlow* decreed in the affirmative, upon the principle that the fund was to be kept entire until the *youngest* child of the testator's three daughters attained the age of twenty-one.

The following case is an authority that a child of a second mar-

(*c*) 3 Ves. 730. (*d*) 3 Bro. C. C. 352. ed. by *Belt*, 14 Ves. 256.

riage may take with children of a prior, although the first husband were living when the will was made. So that if a legacy were given to the children of *A.* to be paid at their ages of twenty-one, and *A.* married again after the testator's death, and had a child by that marriage, before the eldest of the first marriage attained twenty-one, such child would be entitled to share the legacy with the children of the former marriage. The case also proves, that in order to confine the generality of the word "children," to those of the first marriage, it must clearly appear,(*e*) that the testator meant by the term "children," those only of that marriage; and that conjecture or private opinion or belief of his intention to use the word in such a restricted sense will be ineffectual.

Thus in *Barrington* v. *Tristram*,(*f*) Admiral *Barrington* bequeathed 5000*l.* three per cent. consols, in trust for all the children of his niece, Mrs. *Tristram*, the wife of *Thomas Tristram*, in equal shares; to be vested interests in, and transferred to such of them as should be sons, at twenty-one, and to daughters at that age, or on marriage with consent, with benefit of survivorship, directing a sufficient part of the dividends to be applied for their maintenance, *without any regard to the ability of their father;* but if any of them died before their interests vested, leaving issue, it was to stand in the place of its parent. And if all the children of Mrs. *Tristram* died before they became entitled as aforesaid, and without leaving issue, the 5000*l.* annuities were to be in trust for all the children of *Barrington Price*, who should be living at the death of the *surviving* child of Mrs. *Tristram*. The testator died soon after the date of his will. *Thomas Tristram* died about a year before him, leaving six children. Mrs. *Tristram* married again, and had one child, *Louisa Cooke*, who claimed a share of the annuities. Against that demand it was urged, if the construction were extended to a child coming into *esse* after the death of the testator, it must also be extended under the will, so as to give to the children of that child a proportion of the fund, at the age of twenty-one, which would be prolonging the vesting to a period beyond that allowed by law; a difficulty which could not occur if it were understood, children living at the testator's death. To that argument, Lord *Eldon* answered, that the rule being long settled which lets in all children born before a share of the fund is payable, the objection taken in this case, was no more than that of a testator having given property to persons whom the law ascertains, with a limitation over, which could not take effect; instances of which occurred every day. And although his Lordship expressed, as his *private* opinion, that the admiral never contemplated his niece's second marriage, and that the objects of his bounty were her children by Mr. *Tristram*, yet he considered that intention not to be sufficiently clear upon which to found a *judicial* opinion against the general words in the will. He, therefore, after expressing a strong conjecture against that opinion in a *judicial* sense, declared, that every child of Mrs. *Tristram* (then *Cooke*) should take, who might come into existence before any of her sons attained twenty-one, or any of her daughters attained that age or married, or any child married and died under twenty-one, leaving issue.

(*e*) As in *Salkeld* v. *Vernon*, 1 Eden, 64. 71. (*f*) 6 Ves. 345.

Besides the objection taken to the rule itself (before stated,) it is obvious that there are circumstances in the last case affording strong presumption, that the testator merely intended to provide for the children of his niece by Mr. *Tristram*. It is true that in making the gift to the children of his niece, he calls her "the wife of the Reverend *Thomas Tristram*," which are words of mere description, and from whence no inference whatever arises; but a very probable conjecture results from the clause of maintenance directed to be allowed the children without regard to the ability of "their *father*," that by the term "father" Mr. *Tristram* then living was personally alluded to, and consequently that the niece's children by him were alone intended to take the provision. Lord *Eldon*, however, repelled the presumption in observing, that there were no words to the above effect, and that the word "father" in the passage was insufficient to prevent the application of the general rule. It may be also observed, that in the gift over of the fund, the exclusion of the children of *Barrington Price* who should not be living at the death of the *surviving child* of Mrs. *Tristram*, might induce a presumption that the testator only meant children by Mr. *Tristram*, and so thought Lord *Eldon;* but his Lordship remarked, it would be very difficult to make out the title of the children of *Barrington Price* against those of Mrs. *Tristram* by any other husband.

Since the rule excluding children from a participation in the property, who are not in being when an eldest child attains twenty-one, and then entitled to call for his share, is founded upon convenience and necessity; slight circumstances of intention to include all children generally will not be permitted to form exceptions out of it. If then a testator not only give a legacy to the children of *A.* at twenty-one, but add the expressions "born or *to be* born," still a child coming into *esse* after the eldest has attained the above age, will be excluded.

Accordingly in *Whitbread* v. Lord *St. John*,(*g*) the bequest was of 12,000*l.* to trustees, to apply the interest towards the education of all the children of the testator's daughter, Lady *St. John*, during their minorities, or until marriage with consent; and the trustees were directed to pay the principal "unto and among the child and children of his said daughter *by* Lord *St. John*, born or *to be* born, *as many as there might be*, in equal shares," when and as they should attain their ages of twenty-one, or be married with consent, &c.; with benefit of survivorship, and a limitation over, in the event of *all* dying before twenty-one, or marriage, &c. There were four children of Lord and Lady *St. John*, two of whom having attained twenty-one, petitioned for their shares; a request which could not have been granted, if all the children that Lord and Lady *St. John* might in future have were entitled to portions of the legacy. And Lord *Eldon* ordered payment of two-fourths to the adult legatees upon the foundation of the rule before mentioned.

Upon the authority of the last was decided the case of *Gilbert* v. *Boorman*,(*h*) in which a residue was bequeathed to the plaintiff, *nominatim*, and "all the other children *hereafter to be born*," of a child of the testator, at their ages of twenty-one. The plaintiff hav-

(*g*) 10 Ves. 152. (*h*) 11 Ves. 238.

ing attained that age, applied for the fund, which Sir *William Grant* ordered to be paid, observing, that children born afterwards are excluded of necessity when a partial distribution is to take place; though, if that circumstance did not prevent it, all would be entitled.

But as a testator may manifest his intention to include all the children that an individual may ever have, where no period for division of the fund is expressly appointed by him, and such intent will be executed;(*i*) so he may do in instances where, although the shares of children are directed by him to be paid at twenty-one, the whole context of his will shows distinctly, that he meant to provide for *all* the children such individual might ever have: and upon this principle; that where the *great* object of a testator appears to be to include within the terms of his bounty *all* the children of *A.* which is consistent with a *particular* direction in the will, that would have the effect, if followed, of excluding children born after the eldest child attained twenty-one, as also defeat other provisions in it, the latter must give place to the former.(*k*)

It seems to have been upon such grounds that Lord *Rosslyn* determined the case of *Mills* v. *Norris*;(*l*) in which Mr. *Moffat* devised his residuary real and personal estates, and their rents and interest, equally among the children of his two daughters; to be paid to sons at twenty-one, and to daughters at that age, or upon marriage. (Here we perceive the testator expressly declares that the fund is to be divided when the children attain twenty-one, or marry; a direction which, if nothing more appeared, would, as we have seen, exclude all children born after the marriage of a daughter, or the arrival of a son at the age of twenty-one.) The will then declared, that if any child married, and died before their mothers, leaving issue, they should stand in the places of their parents; and in case his daughters died without issue, or, having had such, they should die without issue *in the life-time of his daughters*, the residuary fund should go to the testator's brothers, *James* and *Aaron Moffat*, absolutely. The daughters had two children, who after the death of the testator attained their ages of twenty-one. And Lord *Rosslyn* decided upon the authority of *Shepherd* v. *Ingham*,(*m*) before stated, that all the children which the daughters should have would be entitled, and that a child that came in *esse* after the two children attained twenty-one, was not excluded from a share of the capital.

It is obvious that the testator meant to provide for all children of his daughters, and that the whole residue should go over to his brothers, if his daughters died without leaving a child, or the descendant of a child. This great object would have been disappointed if the fund became vested and distributable, upon the eldest child attaining twenty-one, to the exclusion of after-born children; for in such case, if all the first class had died before their mothers, and they had left the second class of children surviving them, then, although the second description of children could take nothing, they would prevent the fund going to the testator's brothers, and he would have died intestate.

(*i*) *Ante*, p. 51. (*k*) 1 Ball & Beat. 471. (*l*) 5 Ves. 335.
(*m*) Ambl. 448. and see observations *supra*, p. 51; and the case of *Hutcheson* v. *Jones*, stated *infra*, p. 62.

So also in *Defflis* v. *Goldschmidt*,(*n*) the testator bequeathed to *all* the children of his *sister Theobaldina*, whether then born or *thereafter to be born*, 2000*l.* each, payable at twenty-one; directing the shares of daughters marrying under that age to be properly settled, and the interest, until the children's shares became payable, to be paid to his said sister, for her separate use. He then requested his executors to set apart a sufficient fund for paying the legacies to his sister's children as they became due, and the intermediate interest to his sister. And if his sister *died* before *all* her sons attained twenty-one, or before *all* her daughters arrived at that age or marrried, the testator directed a sufficient part of the interest to be applied for their education and maintenance, and the remainder to be added to the capital, &c. It was admitted that the terms of the bequest were sufficient to include all the children of the sister, whether born before or after the testator's death; and the difficulty of making an appropriation to answer legacies given to an uncertain number of persons, viz. all the children the sister might ever have, was urged against the admission of children born after the death of the testator. But Sir *William Grant*, M. R. declared that such difficulty, if it even amounted to positive impracticability, could not control the express words of the testator's declaration; and that his intention not to exclude any of his sister's children must be complied with, even, were it necessary, to the extent of impounding the whole residue.

SECOND. When the distribution of the fund is deferred during the life of a person in *esse*.

The cases under this head are numerous, but they all agree in establishing the general rule before stated, viz. when the enjoyment of the thing given, is by the testator's express declaration not to be immediate by those, among whom it is to be finally divided, but is postponed to a particular period, as the death of *A.* then children or individuals who answer the general description at that time, when the distribution is to be made, are entitled to take, in exclusion of those afterwards coming in *esse*.

Thus in *Ellison* v. *Airey*,(*o*) a woman bequeathed 300*l.* to *Elizabeth Paxton*, to be paid at her age of twenty-one or marriage; but if she died before the happening of either of these events, then to the younger children of *Francis Ellison* equally. Some of *Ellison's* children having been born *before*, others at the *date* of the will, and the rest *after* the death of the testatrix, the question was, which of the above classes were entitled to the legacy? And Lord *Hardwicke* was of opinion that all who should be younger children at the death of *Elizabeth* before twenty-one or marriage, would be entitled to the 300*l.*

The principle which governed the decision was, that the legacy, being contingent, and the fund not divisible before *Elizabeth's* death before marriage or under twenty-one, there was no inconvenience in letting in the younger children of Mr. *Ellison*, who should be born in the intermediate time.

So in the case of the *Attorney General* v. *Crispin*,(*p*) the testatrix, after giving several annuities, bequeathed, after the death of

(*n*) 1 Meriv. 417. 19 Ves. 566. *S. C.* (*o*) 1 Ves. sen. 111.
(*p*) 1 Bro. C. C. 386.

the annuitants, 50*l.* a piece to the children of *D. Riviere*. *D. Riviere* then had seven children, six of whom died in the life of the surviving annuitant. He also had a daughter born after the death of the testatrix, and during the life of that annuitant. One of the questions was, whether the daughter born after the testatrix's death was entitled to a legacy of 50*l.*? And it was determined in her favour.

Also in *Congrève* v. *Congreve*,(*q*) *Ann Nicholls* devised her real estates to trustees in trust for her nephew *T. Congrève* for life, and to sell them *after* his death, and divide the proceeds among all his children at the ages of twenty-one. The testatrix then gave her personal estate to the same trustees to distribute among all the children of her said nephew equally at the same ages. The question was, whether a child born after the testatrix's death, and who had attained twenty-one, was entitled to a share? And it was decided in the affirmative.

The child, in the last case, must be supposed to have been born before any other had attained the age of twenty-one; for in regard to the personal estate, the bequest is *immediate* to all the nephew's children at that age, so that when the eldest arrived at that period of life, the fund became distributable, to the exclusion of after-born children, except of such as might then be in *ventre sa mere*. And with respect to the proceeds from the sale directed of the real estate, there could be no doubt of the child's right to participate in them, since it was in *esse* at the death of its father, the time appointed for the distribution, all the children having attained their ages of twenty-one.

The next is a case of frequent reference and of general authority on this subject. In *Devisme* v. *Mello*,(*r*) Mr. *Devisme* made bequests by a codicil to the following effect: "I give a further sum of 5000*l.* to purchase stock, and the interest to be paid to my mother *Marianne Devisme*. At her death the interest to be paid to my brother *William Devisme*, and at his demise to my godson *Stephen;* at his decease, if before he be of age, to be divided among his brothers equally." Again, "I give to my brother *Lewis Devisme*, 4000*l.* to buy stock, to enjoy the income during life, and if he do not marry and leave children, to revert to my brother *William's* children in equal parts." The testator died in November 1770. *Stephen*, his godson and son of *William*, died an infant before his father, on the 26th of February 1770; and before the making of the codicil, leaving *William* and *James* his two brothers; and who were his only brothers living at the date of the codicil, and at the testator's death. *Stephen* had also two sisters, *Elizabeth* and *Sophia*, living at the two last mentioned periods; but *Sophia* died in January 1774. *Lewis Devisme*, the testator's brother, died in September 1776, unmarried and without issue, at which time *William* his brother, had no children living, except *William*, *James*, and *Elizabeth*. *Marianne Devisme*, the mother, died in February 1779; and *William Devisme* the brother, in February 1781, leaving children, *William*, *James*, and

(*q*) 1 Bro. C. C. 530. and see *Bartlett* v. *Hollister*, in a note to the last case, S. P. and *Gilmore* v. *Severn*, 1 Bro. C. C. 582.
(*r*) 1 Bro. C. C. 537. ed. by *Belt*.

Elizabeth, and another son *Andrew*, who was born in October 1778, after the testator's death, and *after* the death of *Lewis Devisme*, the brother. The questions appear to have been two; first, whether *Andrew* was entitled with his brothers to a share of the legacy of 5000*l.* given to his brother *Stephen*, although not born till after the deaths of the testator and of *Stephen*. And Lord *Thurlow* decided in the affirmative, upon the principle, that as *Andrew* was born before the distribution of the fund, the division not being to take place during the life of his father *William*, he was entitled to a part of it. The second question seems to have been, whether *Elizabeth*, the sister and personal representative of *Sophia*, the daughter of the testator's brother, *William Devisme*, was entitled to any part of the legacy of 4000*l.* bequeathed to *William's* children at the death of *Lewis*, as *Sophia* died during the life of *Lewis*? And his Lordship determined in *Elizabeth's* favour.

It may be inferred from the silence of the report in regard to any supposed interests of *Stephen* and *Andrew* in the 4000*l.* that it was considered they had none, since both of them were born *after* the death of *Lewis*, the tenant for life. And this case is an authority that, if a child come in *esse* previous to the death of a tenant for life of the fund, it takes a vested interest; which, in the event of its dying before such tenant, will entitle its personal representative to a portion when the property becomes distributable.

It follows from the preceding authorities, that if the bequest be not to children generally, but to a child to be born, particularly described, and intended to take the legacy upon the death of a person to whom it is previously given for life, or for a determinate period, it must not only answer the description, but be in existence when the event, upon which it is to take, happens. For if a legacy be given to *B.* for life, and then to the eldest child of *C.* and if he have none, then to *D.* should *C.* have no child at the death of *B.* but one is afterwards born, it will be excluded, and *D.* will be entitled to the money. As an example of this:—

John Cree, after bequeathing several annuities, proceeded, "And the first annuities of the great ones which *falls in*, I desire may devolve upon the *eldest* child, male or female, of *William Harwood* for life." He then gives directions relative to the *interest* of his property in the event of its sufficiency or insufficiency to answer the annuities; and bequeathed the annuities *as they fell in*, except two, to the *surviving* annuitants. Upon the death of the *survivor* he gave the *whole* property to the heirs male of *Philip Francis*, and in default of issue, to the female branch of the family of *Philip Francis*. Two annuitants of 200*l.* and 300*l.* died a few years after the testator; and *Clara*, the only legitimate child of *William Harwood*, claimed the latter annuity, though not born till *after* the death of the first annuitant; but her claim was disallowed(*s*) upon the authority of the case of *Devisme* v. *Mello*, before stated.

The principle which founded the last decision seems to be this; that if a child, not in *esse* when the will is made, be described and intended to take a testamentary gift, upon the death of a person, and there are subsequent executory limitations of the property, and the

(*s*) *Godfrey* v. *Davis*, 6 Ves. 43. 48.

child should not be born till *after* the person's decease, he will not be permitted to claim the legacy; for the policy of law is in favour of vested interests; and the law will not in this case *suspend* the rights of subsequent legatees on account of the *possibility* of a prior legatee coming into existence who would be entitled, but who, by not being in *esse* to take in succession, was incapable of accepting the bequests at the period intended by the testator.

The cases which have been stated are sufficient to establish the rule before mentioned in regard to the admission or exclusion of after-born children. And the authorities which have been determined in conformity with them, are referred to in note(*t*).

But here we may remark, as in the instances before produced, that where a testator's intention is clear, that all the children, a specified individual may ever have, shall participate in a legacy given to them, upon the contingency of some third person dying before a particular period, and that contingency happens; in such a case not only the children in existence at the happening of the contingency shall be entitled, but those also who come into *esse* during the life of their parent, but after the happening of such contingency.

Thus in the case of *Hutcheson* v. *Jones*,(*u*) in which *Edith Hutcheson*, being entitled to the reversion of a moiety of freehold estates, expectant on the death of *William* her father, bequeathed 500*l*. out of that estate (which she devised to her sister *Ann Jones*) to her niece *Maria Hutcheson*, daughter of her brother *Robert*; to be paid when convenient to *Ann Jones*, with interest from three months after the testatrix's death. And after such payment she directed the money to be placed at interest and paid to *Maria Hutcheson* upon her marriage, or at the age of twenty-one. "And should *Maria* not survive either of those periods, and there be no child orchildren of *Robert Hutcheson*, then the testatrix would have the 500*l*. revert to *Ann Jones*; but in case of *other* children of *Robert Hutcheson*, she would have the said sum equally divided, share and share alike." Upon the death of *William Hutcheson*, the tenant for life, *Philip Jones* and his wife *Ann* entered into possession of the estates. Afterwards *Maria Hutcheson*, died under age, and without ever having been married. Then *Robert Hutcheson* died, leaving a son *William*, born after *Maria's* death, and the plaintiff, *B. Hutcheson*, a child of a second marriage. The question was, whether *William*, the son, and the plaintiff, were entitled to the 500*l*. they not being in *esse* at the death of *Maria Hutcheson*? And Sir *Thomas Plumer*, V. C. determined in the affirmative.

His Honour, in detailing the reasons for his decree, observed, that the fund was reversionary, which was a strong circumstance: that it appeared to have been the testatrix's intention, that Mrs. *Jones* should not take, unless, according to the words of the will, "there should be no child or children of *Robert Hutcheson*;" that he could not declare the fund to revert to her on the death of *Maria*, unless

(*t*) *Graves* v. *Boyle*, 1 Atk. 509. *Haughton* v. *Harrison*, 2 Atk. 329. *Middleton* v. *Messenger*, 5 Ves. 136. *Pulsford* v. *Hunter*, 3 Bro. C. C. 417. *Ayton* v. *Ayton*, 1 Cox. 327. *Paul* v. *Compton*, 8 Ves. 375. *Walker* v. *Shore*, 15 Ves. 122. *Tebbs* v. *Carpenter*, 1 Mad. 290. *Crone* v. *Odell*, 1 Ball & Beat. 449.

(*u*) 2 Madd. 124.

he were to add the words "born at her death;" and that if after-born children were excluded, it must be against the express words of the will, which only gave the money to Mrs. *Jones*, in the event of there being no child or children of *Robert Hutcheson*.

We shall next consider—

5. The instances where, in order to answer the occasions of families, and the intent of parties, "younger children" have been construed to mean such children only as were not entitled to the family or real estate. Accordingly, in cases of provisions made by parents, or persons *in loco parentum*, for younger children either by deed or will, the family estate being limited to the eldest son and his issue, remainder to his brothers and their issues successively, a younger brother eventually becoming entitled to the family estate *before* the portions were payable, has been considered an *eldest* child, so as to exclude him from the benefit of the provision for youngest children.

The leading case upon this subject is *Chadwick* v. *Doleman*;(*x*) in which Sir *Thomas Doleman* having a power by marriage settlement to appoint portions among *younger* children, to be raised within *six* months after his death, appointed 2600*l.* part of the aggregate sum to *Thomas*, describing him as his *second* son. The *eldest* son afterwards died without issue; upon which event *Thomas* becoming the *eldest*, and succeeding to the estate, his father made a *new* appointment of the 2600*l.* among his then *younger* children; and the only question was, whether the first or second appointment should stand? And it was determined in favour of the latter, upon the ground, that *Thomas's* continuing a *younger* child up to the period of the provision taking effect in point of payment, was a tacit or implied condition, going along with the appointment, and that as such condition failed, the first appointment to *Thomas* must be considered nugatory, and that therefore the second appointment must be established.(*y*)

The last case was approved by Lord *Hardwicke* in that of Lord *Teynham* v. *Webb*,(*z*) in which a *grandmother*, acting *in loco parentis*, provided portions for her *younger* grand-children to be raised after the deaths of herself and daughter, Lady *Audley*, and to be subject, as to the proportions, to the appointment of Lord *Teynham*, the father of those children; but if he made no appointment, the fund was to be divided among them equally. His Lordship had three children, *Philip*, *Mary*, and the plaintiff, and he died without making an appointment. *Philip*, the eldest son, afterwards died during the life of his grandmother, and the plaintiff becoming the *eldest* son, succeeded to the title and estate. The question was, whether he was entitled to a share in the fund provided as portions for younger children? And Lord *Hardwicke* determined in the negative; observing, that the father's death without appointing made no alteration in the rule prevailing in those cases; but that the same condition was to be implied in the direction in *default* of appointment, as in the *execution* of the power, for "younger children" could not be construed to mean one thing in case of default of appointment, and another in the execution of the power.

The two last cases were followed by *Hall* v. *Hewer*,(*a*) *Loder* v.

(*x*) 2 Vern. 528. (*y*) See 2 Ves. sen. 211. (*z*) Ibid. 198–210. (*a*) Ambl. 203.

Loder,(*b*) before Lord *Hardwicke*; by *Broadmead* v. *Wood*,(*c*) before Lord *Thurlow*; by Lady *Lincoln* v. *Pelham*,(*d*) before Lord *Eldon*, a case resembling that of Lord *Teynham* v. *Webb*, in the circumstance of a grandmother being the provider of the portions; by *Bowles* v. *Bowles*,(*e*) before the same Judge; and by *Matthews* v. *Paul*,(*f*) before Sir *Thomas Plumer*. In all these cases the determinations agreed with the two last stated.

It is to be remarked, that the several authorities before-mentioned and referred to, were cases where the change of character from a younger to an eldest son occurred previous to the period when the funds became distributable. This observation is important; for if the time of division arrive *before* a younger become an eldest child, distribution will be considered as having been made at the appointed period, and then the change in the description of the younger child will have happened too late to prejudice the interests which he took while he continued in that character,(*g*) except under very special circumstances, an instance of which occurred in *Leake* v. *Leake*,(*h*) a case of great complexity. It appears that *John*, a younger son, retained that description at the death of his father, and *as such*, was entitled, with other younger children then living, under the father's will and codicil (after bringing into hotchpot advancements made to him and them by their father during his life, so as to place all of them upon a perfect equality,) to a share of the father's residuary estate, which was so given as to be distributable among younger children at the *father's death*, and which was accordingly so divided by their mother. After this, and while the mother was in existence, *John* became an *eldest* son, and succeeded to estates charged by marriage settlement with portions for *younger* children *to be raised after* the mother's death, the amount of each child's share to be regulated by advancements which might have been made to them by their father, whilst living, as directed, in regard to his residuary estate given by his will and codicil. *John*, notwithstanding his change of character in the life-time of his mother, from a *younger* to an eldest child, was directed by Lord *Eldon* to be considered as a *younger* child in the account to be taken among the younger children; thus necessarily entitling him (though no longer a younger, but the eldest) to a share of the money now to be raised for younger children under the settlement, the mother being dead; and also bringing again into account the residuary estate long before distributable, and distributed while *John* was one of the younger children: two circumstances, which, taken in the abstract, would have shaken the rules before considered to be established by preceding cases. But Lord *Eldon* formed his opinion and judgment upon the father's *intention* apparent in his settlement, will, and codicil, to provide and make *equal* provision for *all* his younger children, as well those living at his own as at his wife's death, and who, with that view, had disposed of the *whole* of his property in relation to the portions to be raised under the settlement; an equality that could not be at-

(*b*) 2 Ves. 531. (*c*) 1 Bro. C. C. 77. (*d*) 10 Ves. 166–172.
(*e*) 10 Ves. 177. and see *Savage* v. *Carroll*, 1 Ball & Beat. 265.
(*f*) 2 Wils. C. C. 64. (*g*) 1 Ball & Beat. 278. 2 Ves. sen. 211. *Windham* v. *Graham*, 1 Russ. C. C. 331. (*h*) 10 Ves. 477.

tained without *John's* accounting with the other younger children for the share he received of his father's residuary estate, and the advancements made to him *as a younger* child; for if those advancements exceeded his portion by settlement, the difference was either to be supplied to the other children out of his share of the residue, or the *perfect equality* designed by the father must have been disappointed. This case is therefore an exception only to the general rules before stated; and it was so considered by Lord *Manners*, Chancellor of *Ireland*, in *Savage* v. *Carrol.*(*i*)

6. When an *Eldest* or only child considered a *Younger.*

Every child but the heir is looked upon as a younger child in a Court of Equity. On which principle it is, that an "eldest daughter," destitute of a provision, has been considered a *younger* child, to answer the general intention, although not literally falling within the description.

Accordingly in *Beale* v. *Beale*,(*k*) *A.* being tenant for life of an estate, remainder to such woman as he should marry, remainder to his first and other sons in tail male, with remainder to *B.* his brother in fee, was empowered to charge the land with 2000*l.* for the portions of *younger* children living at his death. *A.* married, and had issue two daughters, but no son, and the second daughter was in *ventre sa mere* at his death. He charged the estate by will with 2000*l.* for those two children, payable at their ages of twenty-one. And it was objected, that the *eldest* daughter could not claim any part of the money, because she was not a younger child; and that the other had no title, as she was not born at her father's death. But Lord *Harcourt*, C. determined in favour of both of them, on the ground that the estate being the property of *B.* the remainder-man, the daughters were unprovided for, and in such a case the *eldest* daughter was to be considered in equity a younger child; and her sister being in *ventre sa mere* at her father's death was to be regarded as a child living at that period.

So in *Butler* v. *Duncombe*,(*l*) Lord *Parker*, C. decided where the only issue of the marriage was a daughter, that she was entitled to a portion provided for *younger* children, as otherwise she would have been left destitute, the real estate descending in another channel.

Lord *Hardwicke* made a similar decree in *Heneage* v. *Hunloke*,(*m*) a case attended with this particularity, that a settlement was made of freehold houses to *uses*, which, according to articles preceding the marriage, ought to have been *trusts*. By them, 1300*l.* were directed to be invested in *South Sea* annuities, in trust after the death of the surviving parent for the younger child or children. The only issue of the marriage were a son and daughter; and his Lordship observed, that the present case differed from preceding authorities in this particular, that the limitations were *legal*, and his recollection furnished him with no instance where a Court of Equity, under such a circumstance, adopted the construction of an *eldest* daughter or child being considered a *younger*. For the limitation being *legal*, must, as he conceived, receive the same construction in equity as in a court of law; and since at law, he doubted whether

(*i*) 1 Ball & Beat. 279. (*k*) 1 P. Will. 244. (*l*) 1 P. Will. 449-451.
(*m*) 2 Atk. 456. and see *Pierson* v. *Garnet*, 2 Bro. C. C. 38-47. S. P.

an *eldest* child would be permitted to recover under a limitation to a younger; his opinion seems to have been, that had the question rested upon the settlement alone, a Court of Equity could not have applied its rule, before mentioned, where the property was *equitable*, so as to give the houses to the *eldest* child under a limitation to a *younger*. But Lord *Hardwicke* surmounted this objection by referring to the articles, which were *executory*, and ought to be performed according to the intention of the parties, which was to provide for *all* the children, except an eldest son; a construction which entitled the daughter, though in seniority the eldest child, and his Lordship added, that the Court would rectify the mistake in preparation of the settlement.

7. The principle which entitles a daughter, who is the eldest child, to a portion provided for a younger, will enable an "eldest son" to claim a portion as a *younger* child, when the family estate is given from him, or he is otherwise unprovided for.

Thus in *Emery* v. *England*,(*n*) *John England* bequeathed to his brother and sister, *Joseph* and *Sarah*, all his effects, if his sister *Mary* had no child at his death, or within a year afterwards; but if she had any, such child or children at either of those periods, he gave one-third of his property to the *youngest*. The other two-thirds he gave to *Joseph* and *Sarah* equally, with benefit of survivorship, between them, if either died before him, unless *Sarah* had a child or children, in which event, her third was to belong to her *youngest* child, otherwise to her; and *Joseph's* third was to be divided between *Sarah* or her youngest child, and *Mary's youngest* child. *John* was the only child of *Mary* living at the testator's death. She had other children, but none of them were born within a year after the decease of the testator, and were therefore excluded. The question was, whether *John*, though the eldest child, could claim the third bequeathed to the *youngest* child of *Mary*. And Lord *Rosslyn*, without argument, decided in the affirmative.

The last is a case in which the provision was made by a *collateral* relation, intending to provide for all the members of his family, and therefore to be considered as placing himself *in loco parentis*. Such also was the case next to be stated, and the Court alluded to the distinction to be attended to when the provisions are made by a stranger for younger children, and by parents or collateral relations, whose duty and intentions are to provide for the several branches of their families.

The case alluded to is, *Duke* v. *Doidge*,(*o*) in which *Richard Doidge* the elder, and *Richard* his eldest son, created a term of 1500 years in an estate, to commence from their deaths without issue male, in trust, if *Thomas* (Richard the elder's brother) then had one or more children, to raise portions for them, not exceeding 1500*l*., as the surviving *Richard* should direct, and in default of appointment, to raise that sum for such children in equal shares, payable at the end of six months after the term began; but if no such *younger* children were living at the commencement of the term, &c. it was to be surrendered. The estate was limited upon

(*n*) 3 Ves. 232. (*o*) 2 Ves. sen. 203. in a note.

the determination of the term to the use of such son of *Thomas* as the two *Richards* or the survivor should appoint; and in default of such issue or appointment, to the first and other sons of *Thomas* successively in tail male; remainder to the right heirs of *Richard* the elder. The last-named *Richard* and his brother *Thomas*, died before *Richard* the younger, who limited the estate after the determination of the term to *Richard*, *Thomas's third* son, in tail male, and then died without issue, or appointing any sum to be raised under the term for the younger children of *Thomas*. The children of *Thomas*, when the term commenced, were four; *George*, *Robert*, *Richard* (the third son to whom the estate was limited,) and *Ann*. *George*, although the *eldest* son, claimed a share of the 1500*l*. as a younger child, and the validity of his title was the only question. The Court determined in his favour.

In the last case the Court said, it did not, as between parent and child, consider the words "elder," or "younger," and that an eldest child unprovided for, should take as a younger. Also, that there was no difference in this respect when the provision proceeded from a *collateral* relation intending to provide for all the branches of his family, as *Richard* the elder clearly meant to do in the present instance.

It appears from the cases which have been stated and referred to, that the persons settling or bequeathing to *younger* children, were either their parents or relations, who may be considered *in loco parentis*, and intending to provide for all the children of the person described. The Court, therefore, *rejected* the words "younger" or "youngest," "elder" or eldest," for the purpose of letting in a child not answering the description, who would otherwise have been unprovided for, contrary to the intention of the person whose duty it was to have left it a maintenance, or of the person who had taken upon himself the performance of that obligation. But when there is no such relation between the donor or devisor and the children, either real or assumed, it may be inferred from several of the following cases, that a Court of Equity will require a child claiming part of a sum bequeathed to younger children to answer the description. Such was the opinion of Lord *Hardwicke* in *Hall* v. *Hewer*,(*p*) after the case had been argued before him, and which was to the following effect:—*Robert Hewer* devised lands to trustees for a term of years, to raise 6,000*l*. which, by a codicil, he directed to be paid to the *younger* children of a Mr. *Hall*, if his brother *John Hewer* died without children. He devised his real estate to *John Hewer* for life, remainder to *John's* first and other sons in tail male, remainder to daughters in tail, with remainder to *Humphrey*, second son of *John Hall*, in fee. *James* the eldest son of *Hall*, died before *John Hewer*, who also died without children, so that *Humphrey* became the *eldest* son of *Hall;* and he nevertheless claimed a part of the 6,000*l*. bequeathed to *Hall's* younger children. But Lord *Hardwicke* determined, that as *Humphrey* became an *eldest* son before the 6000*l*. were distributable, he was excluded. And upon it being urged at the bar, that *Humphrey* was to be con-

(*p*) Ambl. 203.

sidered as an eldest son, *quoad hoc*, because the testator had given to him the inheritance of the estate, his Lordship said, "there was *no case* where the Court had considered a younger child as an eldest; but between *parent and child*, or persons who stood *in loco parentis*." His Lordship's observation in regard to preceding cases seems to be correct; and it does not appear that any subsequent authority has impeached his opinion upon this subject.

The same principle which leads a Court of Equity to consider a younger child an eldest, or an eldest child a younger, also induces it to overlook other descriptions applied to children which they accidentally do not answer, where a parent intends to provide for all his offspring. If then a father bequeath a portion to a child in *ventre sa mere*, by the terms "posthumous child," and he happen to survive its birth, the accident will not deprive the infant of the intended provision.

This was determined in *Jaggard* v. *Jaggard*,(*q*) where a testator being indisposed, and his wife *enceinte*, made his will, and gave to a daughter then living, 1500*l*. but if his wife should have a *posthumous* daughter, it was to receive 500*l*. of the 1500*l*. The wife having been delivered of a daughter during the life of the testator, which prevented the child from answering the description of posthumous, the question was, whether she was entitled to the 500*l*.? And Lord *Somers* declared, that the second daughter, although born during the life of her father, was to be considered a posthumous child within the meaning of the will.

But in general no rule is better settled, than that legatees must answer the description and character given of them in the will; so that a bequest to the *seventh* child of *B*. will not entitle an *eighth*, who, by the death of the seventh child before the testator, becomes the seventh.

This was carried to a great extent in the case of *West* v. The *Lord Primate* of *Ireland*,(*r*) in which the testator bequeathed by codicil in these words; "I desire that my executor would at his decease bequeath 100 guineas to Lord *Cantalupe* for the use of his *seventh* or *youngest* child, *in case he should not have* a seventh living." His Lordship had six children at the date of the codicil, and another, born previous to the codicil, was then dead. Two months after the testator's death, Lord *C*. had another son born, whom he named *Septimus*, and afterwards other children came into *esse*, the youngest of which was called *Matilda*. The question was, whether *Septimus*, or *Matilda*, the youngest child of Lord *C*. was entitled to the legacy? And Lord *Thurlow* was of opinion, that as *Septimus* was in fact the *eighth* child, he could not take by the description of *seventh*. He therefore decreed the money to *Matilda;* a decree which he affirmed upon a re-hearing.

It is presumed that the last must be considered an exceedingly strong case, when the number of children Lord *Cantalupe* had at the date of the codicil, and the prospective nature of the bequest, are contemplated. The sense in which the testator used the word *seventh* cannot be doubted. It was not in relation to the number of

(*q*) Pre. Ch. 177. (*r*) 3 Bro. C. C. 148. 2 Cox. 258. *S. C.*

children his Lordship might have had previously to the codicil, but a *seventh* in reference to the number living when that instrument was made, which were *six*. *Septimus*, therefore, appears to have been the person designated and intended by the testator; and in this view of the case he answered the description of *seventh* child of Lord *C. if he should have one*. If these remarks be just, probably a similar case would at present receive a different determination.

Of such importance is it for a legatee to answer the terms of the bequest, that if he do so, he may even make a good title to the legacy or portion, notwithstanding it may appear contradictory to the testator's intention. An instance of this occurred in the following case:

In *Trafford* v. *Ashton*,(*s*) Mr. *Vavasor* devised all his estate in trust for his daughter for life, remainder to her *second* son to be begotten in tail male, and so to every younger son; remainder to her eldest daughter, and the *first* son of her body; the testator apologizing for omitting the eldest son from the expectation he entertained of his daughter marrying so prudently as to ensure a provision for such son. The daughter married Sir *Ralph Ashton*, and had children, *Edmund*, the eldest, *Richard* and *Ann Trafford*. *Edmund* died shortly after his birth, and then *Richard* was born, who was the only and eldest son of Lady *Ashton*. The question was, whether he was entitled, under the description "second son," to Mr. *Vavasor's* estate? And it was determined in the affirmative; the *Chancellor* observing, that second son was *second* in the order of birth: *Richard* therefore answering that description, was entitled, although it was contrary to the testator's intention. exploded

We shall proceed in the next place to consider—

8. When grand-children, &c. may and may not take under the word "children."

The word "children" does not, ordinarily and properly speaking, comprehend grand-children, or issue generally. Their being included in that term is only permitted in two cases, viz. from necessity, which occurs where the will would remain inoperative, unless the sense of the word "children" were extended beyond its natural import: and where the testator has clearly shown by *other* words, that he did not intend to use the term "children" in its proper actual meaning, but in a more extensive sense. By these tests questions upon the present subject are to be examined and determined. It will therefore be convenient, for the sake of perspicuity, to begin with considering—

FIRST, where the word "children" was extended beyond its natural import from necessity.

Referrible to this head is *Wylde's* case,(*t*) where, upon a devise to a man and his *children*, it was held, if there were no children at the date of the will, the father would take an estate tail; and *children* would mean *issue;* for it was evident something was intended for children: but none being in *esse*, they could take nothing except through the father; and he could transmit to them nothing, unless he had an estate of inheritance. It was *necessary*, therefore, to con-

(*s*) 2 Vern. 660. 1 Eq. Ca. Abr. 213, pl. 8. *S. C.* (*t*) 6 Rep. 16.

strue the word "children" issue, on account of the general apparent intention.(*u*)

It was necessity, therefore, that in the last case converted the word "children" into a word of limitation; a construction never to be put upon that term except for the purpose of giving operation to the will, and effectuating the testator's intention; for the word "children" is naturally one of purchase, as observed by Lord *Hardwicke* in *Buffar* v. *Bradford*,(*x*) and so he determined in that case, in declaring that a bequest made to a mother and her children (she having a child after the date of the will, who survived the testator) did not lapse by the mother's death in the life-time of the devisor, but belonged to the child; upon the principle, that the legatees took as *purchasers* in joint tenancy;(*y*) a judgment which could not have been pronounced if the child had taken by representation through its mother.

Secondly, instances where a testator, by using the words "children" and "*issue*" indiscriminately, showed his intention to use the former term in the sense of issue, so as to entitle grand-children, &c. to take under it.

In *Wythe* v. *Blackman*,(*z*) Colonel *Thurston*, by a voluntary deed, limited real estate after the death of himself and nephew *John*, and failure of estates in tail male to *John's* first and other sons, to four persons, Lady *Chacy*, Mrs. *Wythe*, and Mrs. *Blackman* (his three sisters,) and the fourth was his niece (daughter of a deceased brother,) to sell and divide the money and mesne profits among themselves (naming them,) or the respective *issues* of their bodies, if they or any of them should be dead, upon the failure of such *issue* male of *John*, viz. to each of them, or their respective *children*, a fourth part. But if any of them should be dead without *issue*, on such failure of *issue* of *John*, then to the survivors or their respective *children* equally, if any of them should be dead leaving *issue*. *John* survived the testator, and died after being in possession of the estate, and without issue. The three sisters and niece died before *John*, the niece leaving no issue; but at the death of *John*, Lady *Chacy* had three children, Mrs. *Wythe* both children and *great* grand-children, and Mrs. *Blackman grand*-children only. One of the questions was, whether the *children* of Lady *Chacy* and of Mrs. *Wythe* were entitled to have the whole estate divided among them in two shares; or whether the grand-children of Mrs. *Blackman*, and the great grand-children of Mrs. *Wythe*, were entitled to participate with them? A question turning upon the point, whether the import of the word "issue" was to be restrained by that of "children," or the import of the word "children" was to be enlarged by that of "issue"? And Lord *Hardwicke* determined, that children, grand-children, and great grand-children, were collectively entitled.

His Lordship founded his decree upon the special circumstances of the case. He commented upon the great length of time which

(*u*) 10 Ves. 201. (*x*) 2 Atk. 221.
(*y*) See chap. 8. on lapsed legacies, and title "Joint Tenants."
(*z*) 1 Ves. sen. 196. reported in Ambl. 555. by the names of *Wythe* v. *Thurlston*, and stated by Lord *Alvanley* from Reg. Lib. in *Davenport* v. *Hanbury*. 3 Ves. 258.

might have elapsed before the trust fund became divisible, and on the apparent intention of the settler, not only to provide for his sisters and niece, if living, when the issue male of *John* failed, but if dead, then for their respective descendants however remote, who should be in existence at that time. Besides the first limitation to the sisters and niece was not to children, but issue as corresponded with the intention. The subsequent adoption of the word "children," was used in the same sense as "issue," which appeared from the limitation to survivors; that being made to depend upon any of the sister's dying without leaving *issue*, the very word used in describing the failure of the lineal descendants of *John;* a circumstance showing the settler's acquaintance with the usual import of the word "issue;" and that he annexed to it the same meaning when he applied it to *John's* descendant's and to those of his sisters. Hence it appears that the present case cannot be adduced to prove, that the word "children" of its own proper import includes grandchildren, &c. as well as children of the persons described.(*a*) It is only authority that when the words "children" and "issue" are mentioned promiscuously, and the contents of the instrument show, that the term "children" was used in the sense of "issue," its natural import will be enlarged to the comprehending of all such individuals as are entitled under the latter word.

The case which next followed, so far differs from the preceding, that the first and direct bequest was made to *children* and *not* to *issue;* but they agree in the circumstance of the limitation over being made dependant upon the death of persons without *issue;* living at the happening of a particular contingency: a limitation clearly indicating the testator's intention to annex to the word "children" the same sense as he had given to the word "issue."

The case alluded to is *Gale* v. *Bennett*,(*b*) in which Mr. *Merttews* having four daughters, *Hester*, *Clara*, *Mary*, and *Elizabeth*, devised real and personal estates to *Hester* for life, remainder to all the children of her body, sons and daughters as tenants in common in fee, with benefit of survivorship if any of the sons died under twenty-one, or daughters before at that age or marriage: and in default of such issue, then to all his *other* daughters living at the death and *failure of issue* of *Hester*, and the *child or children* of his other daughters who should be *then* dead, as tenants in common in fee: but if none of his daughters, nor any *issue* of them should be living at the before mentioned period, he limited the property to his own right heirs. *Hester*, the tenant for life, died without issue. *Clara*, died before her, and there were only grand-children of *Clara* living at the death of *Hester*. *Mary* survived *Hester;* and *Elizabeth* died before *Hester*, leaving two children, who were living at *Hester's* decease. Lord *Camden* decided upon the authority of the last case, that grand-children were entitled under the terms in the will;(*c*) which was equivalent to a declaration, that the testator used the word "children" in the same sense as the term "issue," a term sufficiently comprehensive to include grand-children.

The case next in succession, was determined by Lord *Alvanley*,

(*a*) See 3 Ves. & Bea. 68. (*b*) Ambl. 681.
(*c*) See Sir *William Grant's* comments upon this case, 3 Ves. & Bea. 69.

and arose upon a very obscure will. His Lordship was probably guided by the first mentioned authority of *Wythe* v. *Blackman*, founding his decision upon the indiscriminate use of the words "issue" and "children," and the intention collected from the context of the will, that the term "children" was used in the same sense as "issue."

This case is *Royle* v. *Hamilton*;(*d*) there Mr. *Hunter* gave the following legacies: "I give to the *children* of *William Hunter*, late of, &c. that is to say, to Captain *John Hunter*, of &c. 2000*l*. *and to his issue;* to his sisters or *their issue* 1000*l*. each, (viz.) the issue of his sister *Mable*, deceased, Mrs. *Elizabeth Holt*, wife of *John Holt*, now of, &c.: if Mr. *Holt* should survive her, I will that he have the interest of that share for life; at his death, to the *surviving children* of the said *William Hunter;* Mrs. *Mary Davenport*, wife of the Rev. Mr. *Davenport*, in &c.; and to Mrs. *Rosana Dixon*, wife to Mr. *Dixon*, printer, in &c. The whole sum to the said Captain *John Hunter* and his *issue*, and to his sisters and their *issue*, amounting to 6000*l*.; if any lapse to be divided among the survivors." Mrs. *Holt*, after surviving her husband, died without issue, before the testator. Mrs. *Dixon* also died during the testator's life, leaving five children, grand-children of *William Hunter*. And it was one of the questions, whether those grand-children were entitled to a share of the legacy intended for Mrs. *Holt*, although not the children of *William Hunter*, in the strict and literal sense of the word? And Lord *Alvanley* decided in the affirmative; expressing his opinion to be founded upon the words "the whole sum to the said Captain *John Hunter* and his *issue*, and to his sisters and their *issue*."

His Lordship in pronouncing judgment in the last case, remarked that the word "children" would not mean grand-children, unless their parent, the object of the description were dead.(*e*) We must also except these instances, where the will shows a clear intention to embrace issue beyond the first generation, as in the several authorities before stated. The authorities on the present subject which which remain to be considered, are—

Thirdly, those cases wherein it was determined, that grand-children, &c. were not comprehended in the word "children."

Since the term "children" does not, according to its proper signification, extend farther than to immediate descendants of the person named, and since as a general rule, it is necessary that legatees should accurately answer the description of the bequest, it follows, that if there be a child or children, a grand-child cannot be admitted to participate in a fund bequeathed to "children." In the Earl of *Orford* v. *Churchill*, it was said by Sir *William Grant*, that "he never knew an instance where there were children, to answer the *proper* description, grand-children were permitted to share along with them." A proposition undoubtedly correct, when understood with the qualifications before mentioned, as appears from the following case:

In *Crook* v. *Brooking*,(*f*) the testator vested 1500*l*. in trustees, in trust to allow *Ann Crew* a maintenance out of the interest during her husband's life, with the absolute disposal of the principal, if she survived her husband, but if he were the survivor, the money was

(*d*) 4 Ves. 437. (*e*) See 3 Ves. & Bea. 69. 2 Vern. 108. (*f*) 2 Vern. 107.

to go to her sister's *children*, as she should advise. *Ann* died before her husband, without giving any direction as to the 1500*l.* leaving *Grace*, her only sister, who at *Ann's* death had *one child*, and several *grand-children* in existence. And although Lord *Jefferies* directed the fund to be divided between the only child and the grand-children, yet the Lords *Commissioners*, upon rehearing the cause, reversed the decree, declaring, that where a bequest was made to children, grand-children could not participate *with* them.

The last case, which must have been considered with great attention, has established the legal sense of the word "children," when standing unexplained by any thing in the will, and there are children in existence to take under it. This authority has been referred to and acknowledged in subsequent cases, and its principle was acted upon by Lord *Alvanley*, M. R. in the following instance:

In *Reeves* v. *Brymer*,(*g*) *Michael Forster* bequeathed to his wife the interest of certain bank annuities for life, directing the capital to remain in the same stock for the benefit of his *children* equally, who should be living at the death of his wife. He also made a similar disposition of a leasehold house. The wife and four daughters, *Sarah*, *Mary*, *Ann*, and *Elizabeth*, all married and having children, survived the testator; but *Mary* died before the wife, leaving a child, *grand-child* of the testator, who was living at the death of the wife, an event which had happened. The question was, whether the grand-child was entitled with the testator's surviving children, *Sarah*, *Ann*, and *Elizabeth*? And Lord *Alvanley* determined in the negative, remarking, that "children may mean grand children where there can be no other construction, but not otherwise?"

Consistently with the two preceding authorities, Sir *William Grant* decided the case of *Radcliffe* v. *Buckley*.(*h*)

There *James Buckley* bequeathed his residuary personal estate unto all the legitimate children of *William*, *Henry*, *John*, and *Thomas Buckley*, and *Ann Shaw*, his *late* brothers and sister, in equal shares *per stirpes*. When the will was made there were children and grand-children of all the brothers. *Ann Shaw* had no children then living, but three of them had left several children, one of whom died before the date of the will, leaving children, so that at the death of the testator the claimants were children, grand-children, and great grand-children; but his Honour rejected the claims of the two latter classes upon the principle and authorities before stated.

It is observable, that the last case differs from the preceding authorities in the particular of *Ann Shaw* having had only grandchildren and great grand-children in existence at the date of the will. It was therefore contended with great plausibility, that the testator must have used the term "children" in the enlarged sense of "issue;" and parol evidence was produced to show his acquaintance with the state of *Ann's* family when he made the will; but Sir *William Grant* paid no regard to such testimony, since it alone was inadmissible to alter the construction which properly belonged to the word "children." And with respect to the will itself he said, that as there was

(*g*) 4 Ves. 692. (*h*) 10 Ves. 195.

no expression explanatory of the term "children," indicating the testator's meaning to enlarge the legal import of that word, and since it would be inconsistent, in the absence of clear intention, to construe "children," (a word only once used) in two different senses when applied to children of the four brothers, and when to children of the sister, he should adhere to the *proper* construction of the word throughout, for to depart from it, he ought to be perfectly certain he was executing the testator's intention, a certainty that the present case did not afford.

The next case that occurs upon the present subject, was determined by the same Judge who decided the last. It is an instance of the words "children and grand-children" not being enlarged by the mere mention of the term, "issue" by *introduction* or simple *recital*, and not repeated in the gift or in the limitation over of the property; the Court preferring to adhere to the *operative* part of the instrument expressing the gift to be made to children and grand-children, than to indulge in speculating upon the intention founded merely on inference from the word "issue" being inserted by way of recital or introduction to the gift, and never afterwards resumed. Under such circumstances, the proper meaning of the word children or grand-children will not be extended by that of issue, but the latter will be considered to have been used in the same sense as children or grand-children.

The case alluded to is the Earl of *Orford* v. *Churchill*,(*i*) in which *Charles Churchill*, under the will of his father had, in the event "of having or having had any child or children who should be living, or who should have left *issue* living at his death," a power to appoint the testator's residuary real and personal estate, "to and for all or any of his (Charles's) *children* and *grand-children* that should be so living, with benefit of survivorship, and limitations over (for the benefit of such *children* or *grand-children* as he should direct by deed or will;" and in default of appointment, the property was limited over to *Harriet Churchill*, in the event of *Charles* dying without leaving a *child* or *grand-child*. Upon the marriage of *Charles* (after the testator's death) with Lady *Walpole*, he, by deed of appointment, *reciting* an intention to provide for their children and *issue*, directed 13,000*l.* to be paid out of the estates for the portions of younger "children, sons and daughters," at the usual ages and times, with benefit of survivorship among such "children, sons or daughters," as should die before their shares became payable. And if there were an eldest son, and other "children, sons or daughters," such eldest son was to have 30,000*l.* out of the said funds. "Provided, if any child or children, to whom any sum of money was appointed by the deed, happened to die before *Charles*, leaving any *child* or *children* then living, the portion or portions before appointed for such child or children so dying during the life of *Charles*, should go to such of his and their *children*, as should be living at the decease of the said *Charles*." There were seven children of the marriage, of whom a son named *Charles* was the eldest, and had he lived, would have been entitled to the 30,000*l.*; but he died before his father, leaving three children, *Henry*, *William* and *Helen*. *Hen-*

(*i*) 3 Ves. & Bea. 59.

ry died before his grandfather, leaving *Charles Henry* his only son, and *great grand-child* of the testator. *William* also died, a bachelor, during the life of his grandfather, and *Helen* was the only grand-child who survived her father *Charles*. The question was, whether *Helen*, as such only grand-child living at the death of her father *Charles*, was alone entitled to the 30,000*l*. or whether *Charles Henry*, the great grand-child, was entitled to share with her that sum, which depended on the previous fact, whether in the terms of the will and appointment, great grand-children were comprehended; and that could only be from the effect of the word "issue" introductorily inserted in both instruments. Sir *William Grant* decided against the right and claim of the great grand-child, for the reasons before detailed.

It must be obvious to every reader of the last case, that the testator and his son had only the children and grand-children of the latter in contemplation when the will and appointment were made. Both instruments expressly provide for those two classes only; and although "issue" be once mentioned in each, it is manifest that it was used in the sense of children and grand-children; for if the intention had been to make provisions for all the descendants of the son, it cannot be supposed that the testator, in the passage of the will which gives the power of making such provision, and the son, in the passage of the instrument which exercises that power, should omit the word "*issue*," and *expressly* confine the portions to children and grand-children.

9. The case last stated is an authority over-ruling the apparent opinion of Lord *Northington* in *Hussey* v. *Berkeley*,(*k*) that the word grand-children, would, without further explanation, comprehend *great* grand-children. And it seems but reasonable, that if the word "children" do not include grand-children, as we have seen, the term "grand-children" will not comprise children next to them in descent. The several distinctions which have been mentioned in regard to the enlargement of the word "children" seem applicable to a bequest to grand-children; so that if it appear from the will, that the word "grand-children," was not used in its proper sense, but for the purpose of embracing all the descendants of all the persons described, it will have the effect. An instance of this occurred in the following case:

In *Hussey* v. *Berkeley*,(*l*) Lady *Tyrconnel* having several grand-children and great grand-children, bequeathed to Lady *Netterville* and Mrs. *Hussey*, two of her grand-children, 100*l*. each, to buy rings; and directed her executor to give her residuary personal estate, as she should afterwards appoint. She by a codicil gave legacies to several of her *great* grand-children, and to Lady *Dillon*, the *widow* of her grandson. She also gave to Miss *Hussey* (who was her great grand-daughter) by the description of *grand*-daughter, specific legacies; directing the residue to be divided among her *grand-children named therein*. Two of the questions were, whether *great* grand-

(*k*) 2 Eden. 196.

(*l*) Ibid. and reported in Ambl. 603, under the title of *Hussey* v. *Lady Dillon*. See *Shelley* v. *Bryer*, 1 Jacob. 207, as to grand nieces not being included in the word niece.

children should take a share of the residue with, and under the description of *grand*-children, and whether Lady *Dillon*, who was only a grand-child *by marriage*, was entitled under the description? Lord *Northington* determined in favour of the great grand-children, since the testatrix had shown the sense in which she used the word grand-children, in giving the specific legacies to her *great* grand-child Miss *Hussey*, by the description of *grand*-child. But with respect to the claim of Lady *Dillon* as a *grand*-child *by marriage*, his Lordship said it had no foundation; as the testatrix intended such grand-children only who were related to her by blood.

The next subject for consideration is—

II. Legacies to Natural Children.

It is a maxim of the common law, that *qui ex damnato coitu nascuntur inter liberos non computentur.* The relation of a natural child to its father is not acknowledged before its birth, for the law considers him *quasi nullius filius.* The above maxim is founded in general convenience, the law overlooking a particular hardship when in competition with the public good; and the wisdom of the rule appears from the very great inconvenience and indelicacy there would be in permitting evidence of the children being really begotten by the *same* individual. Hence,

1. Natural children *unborn* at the date of the will, cannot take under a bequest to the children generally, or to the illegitimate children of *A. B.* by *Mary D.*

The difficulty which occurs in such a case as that last supposed, is, how the indentity of the father can be ascertained. That he was the father, decency will not admit the proof; consequently there is no method by which such children can bring themselves within the description of the bequest.(*m*)

In *Metham* v. the Duke of *Devon*,(*n*) the then late Earl of *Devon*, bequeathed 3000*l.* to "all the natural children *of* his son the late duke, by Mrs. *Heneage.*" The question was, whether natural children, born *after* the will, should partake of the legacy? And Lord *Parker*, C. decided in the negative; adopting the rule laid down by Lord *Coke* in his Commentary,(*o*) that a natural child cannot take as the issue of a particular person, until it has acquired the *reputation* of being the child of that person, which cannot be before its birth.

The last case was followed by Sir *William Grant*, M. R. in *Earle* v. *Wilson.*(*p*) The bequest was: "I give to such child, or children, if more than one, which *Mary Mackarel* may happen to be *enceinte* of by me," such sum or sums, &c. *Mary* had a daughter born shortly after the testator's death, who claimed under the above bequest; but his Honour disallowed the claim, because the law would not permit a natural child, unborn at the date of the will, to take under the description of a child.

2. Sir *William Grant* remarked, in deciding the case just stated, that if the bequest had been to the natural child of which a particular

(*m*) 1 Meriv. 148. 1 Ves. & Bea. 446.
(*n*) 1 P. Will. 529, and see *Arnold* v. *Preston*, 18 Ves. 288.
(*o*) Co. Litt. 3, b. (*p*) 1 Ves. & Bea. 528.

woman was *enceinte*, without reference to any person as the father; as there would be no uncertainty in that bequest, it would probably be supported.

His Honour's opinion has been since established by a decision of Lord *Eldon*, in the case of *Gordon* v. *Gordon*.(*q*) There the form of bequest was,—"*As I have reason to believe* that *Adrienne Maillet* is pregnant *by me*, I give to her 50*l*. sterling yearly, &c. I wish the child *of which she is now pregnant*, to be sent to *England* and educated, as *George Louis* (a natural child of the testator, to whom by a former codicil he gave an annuity of 100*l*. from the time of such child's arrival in England) the expense of which is to be paid for by a like annuity of 100*l*. to commence from the arrival of the child in *England*." *Adrienne* was delivered of a daughter, who commenced the present suit for the annuity, but which demand was resisted on the ground of her not having been born when the bequest was made; yet Lord *Eldon* determined in her favour, upon the principle, that it was possible to hold, consistently with the doctrine of Lord *Coke*, that if an illegitimate child, *en ventre sa mere*, be described in such a manner as to ascertain the object, it might take under the description: and his Lordship said, that the words "*the* child with which *Adrienne* is now pregnant," were description sufficient for the purpose.

Such were the words upon which alone his Lordship founded his judgment; but he gave a very strong opinion, that the first expressions would have been sufficient to entitle the after-born daughter. The words were these; "*As I have reason to believe* that *Adrienne* is pregnant by me," &c. Lord *Eldon* marked the distinction between the *assertion* of the *fact* of pregnancy *by* the testator; and the declaration of his *belief* that the woman was *enceinte* by him; and his acting upon such belief, whether right or wrong. In the first case, as the law would not admit proof of that fact, as before observed, the child could not take; but in the second, since the testator chose to *assume* the fact, and to act upon the foundation of his *belief*, there is no uncertainty in the object, since, whether it was or was not the child of the testator, he meant to provide for it as the child of the mother described. His Lordship thus expressed himself: "If the words had been these, *whereas A. is now pregnant by me*, that would imply a positive assertion of a fact, the truth of which, it cannot, on the grounds of public policy, be suffered to sustain by evidence. But a man may most conscientiously make use of the terms adopted by this testator to denote his *belief* of a fact, and his intention to proceed, not upon the fact itself, but upon such his belief of it. No doubt, where a man assigns certain positive reasons for giving a legacy, if those reasons fail, the legacy may be taken away. But here the testator has expressed the grounds upon which he acts to be these: I *believe* that I am the father of the child, with which this woman is now *enceinte*. I may be mistaken; but I had rather run the risk of providing for a child that is not my own, than of incurring the guilt of leaving a child of mine without a provision." (*r*)

(*q*) 1 Meriv. 141, and see *Blundell* v. *Dunn*, cited 1 Mad. 442, and stated *infra* p. 83.

(*r*) 1 Meriv. 148–152.

In the late case of *Evans* v. *Massey*,(*s*) a testator by will, dated the 14th of August 1810, after the words "having two natural children, and the *mother supposed to be carrying a third*," gave all his property in England to be equally divided between them, "that is to say, if another child should be born by *the mother* of the other two in the proper time, that such child to have one-third of such property in England." In another part of the will the testator adds, "I bequeath the whole of my remaining property, after paying *my natural children* as aforesaid, to my two nephews" (naming them) &c. The testator died on the 16th, and the child, of which the mother was *enceinte* at the date of the will, was born in about seven months after. The question was, whether the after-born child, who died shortly after its birth, took the interest intended under the will. Chief Baron *Richards*, after adverting to the cases of *Earle* v. *Wilson* and *Gordon* v. *Gordon*, decided that it did, upon the principle adopted in those cases, that the object of the bequest was described with sufficient certainty. In the course of his judgment the Chief Baron observed, that there was nothing in the terms of the above bequest, to show that the testator meant the child, *en ventre sa mere*, to take *only in case of its being his*. Had there been such a condition annexed to the bequest, we have seen that the bequest would have failed, as evidence *aliunde*, in proof of that fact, would not have been admissible.

The following propositions appear to be the result of the cases which have been cited:

First,—That natural children, *unborn* at the date of the will, and described as children *of* the testator or another man, to be born of a particular woman, cannot take under such a description.

Secondly,—That a legacy to an illegitimate child *en ventre sa mere*, described as the child *of* the testator or of another man, will also fail, since, whether in truth the testator, or such person were or were not the real father, is a fact which can only be ascertained by evidence, that public policy forbids to be admitted; consequently, such child is unable to make out its title as child to the testator or to the person described. But,

Thirdly,—If the child *en ventre sa mere* be merely described as a child, with which its mother is *enceinte*, without mentioning its putative father; or, if the testator express his *belief* that the child is his own, and provide for it under that impression, regardless of the chance of being mistaken; then the child will, in the first case, be capable of taking; and in the second, it will, as presumed, be also entitled, in consequence of the testator's intent to provide for it, whether he be the father or not.

The next subject which regularly follows is—

3. The capacity of illegitimate children to take under the description of "children," when they are *in existence* at the date of the will.

It is settled, that natural children having acquired by reputation, the name and character of children of a particular person prior to the date of his will, are capable of taking under the description of children.(*t*) But the term child, son, issue, and every word of that

(*s*) 8 Price's Ex. R. 22. (*t*) 1 P. Will. 529. 1 Ves. & Bea. 467.

species, is to be considered as *primâ facie* to mean *legitimate* child, son, or issue ;(*u*) so that if a testator merely bequeath to his own children, or to the children of another person, or to one or more of them, and nothing appears from the will sufficient to show that he intended *natural* children then in existence, that class of children will be excluded.(*x*) It seems, indeed, necessary to enable illegitimate children to take as children, that they should be *personæ designatæ*, either by express gift *nominatim*, or by manifest and incontrovertible intention apparent upon the face of the will, that they were meant to be included in the term "children." That intention, however, can only be shown from the will, for evidence cannot be received to prove that they were *intended* by the testator to be included in that description.(*y*) The only testimony admissible in those cases is, that the children had acquired the name and character of children by reputation ;(*z*) and when that character is so established, it remains for the will to show whether they were designated to take under the description of children, the *primâ facie* intention and legal construction being to their disadvantage, as before noticed. And,

FIRST,—We shall consider some of the instances in which the will was deemed to afford insufficient evidence of the testator's intention to include natural children in the term "children."

Cartwright v. *Vawdry*,(*a*) a case before Lord *Rosslyn*, was particular in this respect, that the testator had an illegitimate daughter *Mary*, by his wife before their marriage; and they had three illegitimate daughters afterwards, all of whom survived him. His Lordship is reported to have said, "It was impossible to hold in a court of justice, that an illegitimate child could take equally with lawful children upon a devise to children :" a declaration unquestionably correct in the absence of manifest intention in the will to include such child, as was the case before him. But where clear unequivocal intention appears in the context of a will, that natural children are meant to be included in the term children; then, although legitimate children will not be excluded without a special intent, because they answer the description, and are entitled by law to take under it, such their privilege will not prevent the illegitimate children from participating with them, since their claims are founded upon the clear intention of their common parent, to place them in the same condition as lawful children.(*b*)

In *Cartwright* v. *Vawdry*, just referred to, the testator having a *natural* daughter and three *legitimate* daughters when he made his will, devised his real and personal estates to his executors in trust, to apply a reasonable part of the produce in the maintenance and education of *all* such children as he might have at his death, in equal shares, until they attained twenty-one or married, and then to pay to such of them attaining that age or marrying, *one-fourth* of the whole income. The testator in different parts of his will used the words, she, her, and *daughters*, which, when coupled with the division of the property into *fourths*, appeared to raise a presumption that he had in view not only his three legitimate daughters, but also his natural daughter *Mary*, a circumstance that seems to have

(*u*) Ibid. 462. (*x*) Ibid. 465. (*y*) 1 Ves. & Bea. 462, 463. 470.
(*z*) Ibid. 466. (*a*) 5 Ves. 530. (*b*) 1 Ves. & Bea. 454.

escaped Lord *Eldon's* observation in his comments upon this case, and after mentioned. *Mary* claimed one-fourth of the property, and *proved* that the testator always treated her as a legitimate daughter, and intended to provide for her equally with his other children: (a species of evidence which was before noticed to be inadmissible to explain a will.) But Lord *Rosslyn's* opinion was against her claim.

Lord *Eldon*, in commenting upon this case,(c) considered the determination as solely founded upon the effect of the will, and approved of the decision, on the principle, that the will did not sufficiently indicate the testator's intention to include *Mary*, his natural daughter, in the term "children." His Lordship observed, that the direction to apply the income in *fourths* only afforded a *conjecture* of such intention, since, if between the date of the will and the testator's death, one or two of the four children had died, the division by fourths would have been just as inapplicable as that in thirds, excluding *Mary*. Besides the terms of bequest would not only have included the three legitimate daughters, but all others who might have been born between its date and the testator's death; it was clear therefore that he could not necessarily mean the natural daughter in the general description, it being impossible to say that he meant the three legitimate children, the will providing for children living at his death, although not in existence at the date of it. Under those circumstances his Lordship observed, that the will could not be understood to describe two classes of children, legitimate and illegitimate, and that, in his opinion, the case was rightly decided.

The case which followed was *Godfrey* v. *Davis*,(d) determined by Lord *Alvanley*, M. R. and is a powerful authority in support of what has been noticed, that the intention to entitle a natural child to take under the description of child, must be collected entirely in the will, and not shown from *extrinsic* evidence.

In *Godfrey* v. *Davis*, just mentioned, the bequest was in remainder to the "eldest child, male or female, of *William Harwood*." At that time *Harwood* was a single man, and had illegitimate children, the eldest of whom claimed the legacy under the above description. It was proved on her behalf, that the testator was very intimate with *Harwood* and his family, and knew that he had no legitimate child; also that the claimant, and all his other children, were treated by him as children. Yet the *Master of the Rolls* decided against the claim, upon the ground that the natural daughter was not particularly designated by the testator, and manifestly and incontrovertibly intended to take. His Honour determined the case upon the will alone, in which, as nothing appeared of any intention in the testator to describe a *natural* child by the word "child," he could not supply the omission by parol evidence.(e)

The case next in succession is *Kenebel* v. *Scrafton*,(f) in which *James Pierson*, being unmarried, and having a natural child by *Mary Simpson*, bequeathed his personal estate to her, and an annuity out of the rents of his real estate; and proceeded, "in case I shall have any *child* or *children* by her, who shall be living at my decease, I order," &c. first, maintenance for them till twenty-one; and

(c) In *Wilkinson* v. *Adam*, 1 Ves. & Bea. 464.
(d) 6 Ves. 43–48.
(e) 10 Ves. 203.
(f) 2 East, 530. 542.

secondly, payment to them equally of 3000*l.* when they shall attain that age. The testator afterwards married *Mary Simpson;* before which event the child died. There were three legitimate children of the marriage; and the point immediately before the Court of *King's Bench* was, whether the will of a single man was revoked by his marriage, and the subsequent birth of children? The opinion of the Court, in consistency with former authorities, was, that as marriage alone will not revoke a will, although, when connected with the birth of a child, it will generally have that effect, yet those two circumstances would not so operate in the present instance, since the will contained a provision for children, if there should be any.

It is obvious, from the decision of the Court, that it considered natural children could not in general take with legitimate under the word children, and that the latter were to have the preference. Since, therefore, the terms of bequest in the will just mentioned did not authorize a construction which would let in natural where there were legitimate children, it was a necessary consequence, that as the latter class were provided for by the will, the marriage of their parents, and their birth after the date of the will, could not be a revocation. The Judges, in their remarks upon this case in *Wilkinson* v. *Adam*,(*g*) observed, it might have been well decided upon the facts, that it did not sufficiently appear that the testator intended to include illegitimate children in the term "children;" (an intention which we have seen to be necessary to appear upon the face of a will, and in the absence of which natural children could not take under the description of "children.") And that such were the sentiments of the Court, appears from the judgment, for the reason before stated. Lord *Eldon*, in his comments upon this case in *Wilkinson* v. *Adam*,(*h*) said, "We may *conjecture* that the testator meant illegitimate children, if he did not marry: yet notwithstanding that may be conjectured, the opinion of the Court was, *as mine is*, that where an unmarried man, describing a single woman as dearly beloved by him, does no more than make a provision for her and *children*, he must be considered as intending *legitimate* children; since there is not sufficient upon the *will itself* to show that he meant illegitimate; and it is my opinion that such intention must appear by *necessary implication upon the will.*" The import of the expression, "necessary implication," his Lordship thus defined: "It does not mean natural necessity, but so strong a probability of intention, that an intention contrary to it, which is imputed to a testator, cannot be supposed."

The last case that will be produced under this head is *Swaine* v. *Kennerley*, which is an express decision by Lord *Eldon*, that where there are legitimate and illegitimate children at the date of the will, the latter cannot take with the former under the mere description of children, where the *will itself* does not show that natural children were intended: and his Lordship declared that such proof of intention must be supplied by the will *only;* extrinsic evidence, except to prove the illegitimate children having, at the date of that instrument, acquired the *reputation* of children of the testator, or of the

(*g*) 1 Ves. & Bea. 456. (*h*) Ibid. 465.

person named in it, being inadmissible; and by no means to be received for the purpose of raising a construction by circumstances.

In *Swaine* v. *Kennerley*,(*i*) the case just referred to, the bequest was of 2100*l.* to be invested in land to be settled to the use "of all and every the child and children of his (the testator's) late son *Thomas*," as tenants in common in tail. At the date of the will, the children of *Thomas* were three in number; one legitimate, and two illegitimate: and it was determined that the natural children could not take with the lawful child, because the *will itself* did not prove that the testator meant an illegitimate child.

We shall now proceed—

Secondly, to consider instances in which a will was deemed to afford sufficient evidence of the testator's intention to include natural children in the expression "children."

Two propositions have been proved by the preceding authorities: first, that the will itself must show the testator's intention to include natural children in the term "children," either by express designation, or a necessary implication, collected from the instrument itself: and secondly, that evidence is inadmissible to show such intention, when it is not to be clearly discovered in the will.

It has been decided by great authority, that where a man (married at the date of his will, and without having had a legitimate child) provided by his will for his wife, who he considered would survive him; and also made provision, to commence after his wife's death, for another woman with whom he cohabited, and by whom he had, when the will was made, *natural* children, *reputed* to be his own, and provided for by him as his children by that woman, such children were capable of taking that provision; upon the ground that the above circumstances raised so strong a probability of the testator's intent to provide for them, that it would be absurd to suppose the contrary.

Such was the case of *Wilkinson* v. *Adam*,(*k*) determined by Lord *Eldon*, assisted by three Judges. The form of bequest was, "to the children which I may have by *Ann Lewis*, and living at my decease," &c. The testator had provided for his wife, and for *Ann Lewis* after his wife's death; and the only children he ever had were three illegitimates by *Ann Lewis*, all of whom were living when the will was made, and had at that period acquired the character and reputation of being his natural children, as appeared from the depositions in the cause. Under those circumstances, and the intention collected from the will, it was decided that the three illegitimate children were entitled under the terms of the description in the will.(*l*)

The last determination was founded upon the will alone, and the depositions establishing the *reputation* acquired by the illegitimate children of being children of the testator. Certain memoranda entered by him in a book, proved in the Ecclesiastical Court, as explanatory of the will, were rejected, (part of the subject of disposition being freehold estate,) on the ground that the contents of the book were not to be considered as incorporated in the will. Upon the

(*i*) 1 Ves. & Bea. 469. (*k*) Ibid. 422.
(*l*) See also *Bayley* v. *Snelham*, 1 Sim. & Stuart, 78.

subject of evidence admissible in those cases, Lord *Eldon* expressly confines it to the fact of the children having obtained by reputation the name and character of the testator's children. His Lordship expressed himself to the following effect: "In all the cases I have seen in relation to this question, illegitimate children, if they were to take, must have done so, not by any demonstration arising out of the will itself, but by the effect of evidence *dehors* read or attempted to be read with a view to establish, not out of the contents of the will, but by something *extrinsic*, who were *intended* to be the *devisees;* and if my judgment upon this case is supposed to rest upon any evidence *out* of the will, except that which establishes the fact, of there being individuals who had gained by reputation the name and character of the testator's children, the conclusion is drawn without sufficient attention to the grounds upon which the judgment is formed: my opinion being, that, taking the fact as established, of there being children who had gained the reputation of being his children, it does necessarily appear upon the will itself, that he intended those children."(*m*)

In a case of *Blundell* v. *Dunn*,(*n*) decided at the Rolls a short time before the last, the testator vested stock in trustees upon the following trusts: "to pay *my* wife or *reputed* wife *Sarah* 40*l.* a year for life, and to educate *my* children, &c." The trust of his residuary estate was declared: "to divide the interest among *my* children that are *now* living, and also the child or children that my wife is now *enceinte* with," at their ages of twenty-one; and to divide the principal among them at those periods. When the will was made, the testator had two children by *Sarah*, to whom he was not married; and she was then *enceinte* with another, which was born *after* the testator's death. His Honour decreed the residue to be distributed into three parts corresponding with the number of children, declaring the share of one of them, who died, to be vested in the Crown.

It is apparent from the whole context of the will, that the testator intended to make provision for persons then in existence, and a child *en ventre sa mere*. He describes the mother as his *reputed* wife, and having none but illegitimate children, he *refers* to them as *then* living; so that the will clearly showed the intention of the testator to provide for his two natural children then *in esse*. And with respect to the child *en ventre sa mere*, it is observable that the testator does not bequeath to it as *his* child by *Sarah*, but as the child *of Sarah*, a description, by which, as we have seen, an illegitimate child unborn is capable of taking.

In the following case, Sir *Thomas Plumer*, V. C. expressed a strong opinion that the words, "to *my* children," contained in the will of a *bachelor*, then having illegitimate children, *reputed* to be his own, would include them; the terms being sufficient to mark them as *personæ designatæ*. But the case was not solely determined upon that point, as the will in other parts afforded evidence in conjunction with those words sufficient to show that those natural children were meant to take under them.

The case alluded to is *Beachcroft* v. *Beachcroft*.(*o*) There a single man resident in *India*, having five natural children at the time of

(*m*) 1 Ves. & Bea. 462. (*n*) Cited in 1 Mad. 433. (*o*) 1 Mad. 430.

making his will; (three of whom he had acknowledged to be his children, given his name to, and sent to this country to be educated,) bequeathed in this manner; "to *my* children 5000*l.* sterling each; and to the *mother* of *my* children 6000 sicca rupees;" then giving the residue to his brothers and sisters. Sir *Thomas Plumer* declared, that the illegitimate children were entitled to the legacies, as being sufficiently designated by the will. He concluded his judgment in these words; "After examining this case according to established principles and authorities, I think *ex visceribus* of the will, the legatees whom this testator must have intended to describe, were not the *possible* progeny of a *future* marriage, but existing persons children already born, uniformly designated and recognized by him in that character."

The grounds of his Honour's decree appear to have been these: that the words "my children" explained by the subsequent gift to "the *mother* of *my* children," and the portions of 5000*l.* bequeathed to *each* child, showed distinctly that the testator could only mean children then in existence, which he *had* by the person *described* as *their mother*, and for whom individually he intended first to provide portions, after which he designed the residue of his property for his *legitimate* relations.

In the last case the intention of the testator prevailed, notwithstanding the possibility of his subsequent marriage, and his having legitimate issue. It follows, therefore, if there be *no possibility* of the person described having lawful children, and a legacy be given to his children generally, all those born at the date of the testament, although illegitimate, will be entitled; because it is manifest that they were intended, since there never were any lawful children to which the words of the will could be applied. Suppose then a bequest to be made to the children of *A.* by a will noticing *A's death*, and evidence be given that he never had any lawful child, but left at his decease *natural* children; those children would take upon establishing by proof their title by reputation as children of *A.*, and that he never had any legitimate children to whom the term children could apply.

Such was the case of Lord *Woodhouselee* v. *Dalrymple*,(*p*) determined by Sir *William Grant*, M. R. There Sir *James Craig* bequeathed "to the children of the *late Charles Kerr* who should be living at his (the testator's) death, 2000*l.* in equal shares." It appeared in evidence that *Charles* was married, had five children by his wife before marriage, but no child after that event: that the five were baptized as the children of *Charles* and *Mary Kerr*, and the testator, acquainted with the circumstances of *Charles's* family, well knew the claimants, three of those children who survived him, the testator, and were the persons intended in the bequest made "to the children of the *late Charles Kerr*," and that *Charles* never had a legitimate child. His Honour decided in favour of the three natural children, upon the principle that the death of *Charles* being noticed in the will, and it being proved that previously to his decease he never had any but the five illegitimate children, who had acquired the reputation of being his children, it clearly appeared from the

(*p*) 2 Meriv. 419.

will, (the above collateral points being established) that the testator meant to designate the natural children of *Charles* living when the will was made; for there never were nor could be any children of *Charles* to whom the words of the will could be applied at its making or afterwards, except to those five natural children.

SECT. III. The construction of the word "HEIRS," when applied to personal Estate.

1. A legacy to *A.* and his *heirs*, is an absolute bequest to *A.* and the whole interest in the money vests in him for his own use.(*q*) But when no property in the bequest is given to *A.* and the money is bequeathed to his heirs, or to him, with a limitation to his *heirs*, if he die before the testator, and the contingency happens, then if there be nothing in the will showing the sense in which the testator made use of the word *heirs*, the next of kin of *A.* are entitled to claim under the description, as the only persons appointed by the law to succeed to *personal* property.

We accordingly find Lord *Alvanley* in *Holloway* v. *Holloway*,(*r*) expressing an opinion, (although it was unnecessary for him to decide the point) that the word "heirs," when applied by testament to personal estate, must be understood to mean next of kin, for the reason before mentioned.

So in the case of *Lowndes* v. *Stone*,(*s*) the residuary bequest was to the testator's next of kin or "heir at law," whom he appointed executor. The Court determined that the next of kin were entitled to it.

And in *Vaux* v. *Henderson*,(*t*) *Alexander Coutts* bequeathed 200*l.* to *Edward Vaux;* but if he died before the testator, then to *Edward's* "heirs." *Edward* did not survive the testator, but by will disposed of all his personal estate, appointed executors and left a widow and seven children. Sir *William Grant*, M. R. determined that the legacy belonged to the *next of kin* of *Edward* who were living at the death of the testator *Alexander Coutts*.

2. The above authorities are sufficient to establish the proposition, that a bequest to the heirs of an individual, without addition or explanation, will belong to his next of kin. The rule however is subject to alteration by the intention of testators. If then the contents of the will show, that by the word "heirs" the testator meant other persons than next of kin, those persons will be entitled. Children, therefore, may take under the word "heirs," as in the following case:

Elizabeth Letheuillier bequeathed in the following manner: "I give to my sister *Loveday's heirs* 6000*l.* I give to my sister *Brady's children* 1000*l.* equally." Mrs. *Loveday* had two daughters only, and both were living when the will was made. One of them died before the testatrix, leaving three children, and the other survived her and claimed the whole 6000*l.* The question was, whether the children of the deceased daughter should participate with the surviving daughter, which depended upon the construction of the word "heirs." And Sir *Thomas Clarke*, M. R. was of opinion that the

(*q*) *Crawford* v. *Trotter*, 4 Mad. 361.
(*r*) 5 Ves. 403.
(*s*) 4 Ves. 649.
(*t*) 1 Jac. & Walk. 388.

testatrix had explained that word by the term "children" in the bequest which immediately followed. So that the word "heirs" was to have the same and only meaning as "children," a construction that entitled the surviving daughter to the whole 6000*l.*(*u*)

The intention of testators to use the term "heirs" in the sense of "children" equally appears in instances where the direction as to the distribution of the property is inconsistent with construing that word in its usual acceptation, viz. as a word of limitation.

Suppose then *A.* to give a legacy to *B.* for life, and then "to the heirs, or the heirs of the body of *B.* to be *divided* among them as *B.* shall *appoint* by deed or will;" this delegated authority of distribution shows that the word "heirs" was substituted for children; for it was the obvious intention that the legatees were to take distributively and as purchasers, not in succession as heirs, but together as children. A contrary construction of the words would defeat that intention; for if the expression "heirs" was considered a word of limitation, *B's* life-estate must necessarily be enlarged; it would give him the absolute interest in the fund, to the disappointment of his children, and in contradiction to the power of appointment, which would be rejected, and struck out of the will.(*x*)

The construction will be the same if a bequest be made to a person for life, and afterwards "to the heirs or heirs male of his body *as tenants in common*." In such a case, "heirs" must be considered synonimous with "children;" because it appears to be the intention of the testator to give the legatees interests distinct and independent of that bequeathed to their parents, and in a class, and not successively, as is the manner in which heirs take. Besides, were the word "heirs" interpreted in its natural sense, it would defeat the testator's intention by vesting the absolute interest in the person whom he only intended to take the property for life.(*y*)

So also, if the bequest were to *A.* for life, and to the "heirs or heirs male of his body, *their executors, administrators, and assigns;*" the inconsistency between the natural import of the word "heirs," and the expressions grafted upon them, so clearly shows the testator's meaning by that term to be children, (individuals to take *per capita* in their own rights, and not as heirs successively and by descent) that the word "heirs" will be considered the same as if the testator had used the word children.(*z*)

It is to be remarked, that in the three last instances the bequests to "heirs" were preceded by interests for lives expressly given to the parents; yet the construction of "heirs" to mean children will equally prevail, although that term be not preceded by an express limitation to the parent *for life*, if sufficient appear from the will to show that the word "heirs" was used in the sense of children. And such is the effect of the term "heirs," where it appears to have been used in that sense, whether it be so explained by the testator in words, or the intention be inferentially collected from the context, that the word *ex vi termini* will give by implication an estate *for*

(*u*) *Loveday* v. *Hopkins*, Ambl. 273.
(*x*) *Target* v. *Gaunt*, 1 P. Will. 432. and see 5 Maule & Selw. 100.
(*y*) *Jacobs* v. *Amyatt*, 4 Bro. C. C. 542. *Doe* v. *Wright*, 5 Maule & Selw. 95.
(*z*) *Donne* v. *Merrefield*, cited Forrest, 56. *Hodgeson* v. *Bussey*, 2 Atk. 89.

life to the parent, with remainder to the children; though, according to the case of *Buffar* v. *Bradford*, before stated,(*a*) under a bequest to *A.* and her children, the parent and children would take as joint-tenants, if *A.* had any children living either at the date of the will, or at the death of the testator; the law marking a distinction between the use of the terms "heirs" and "children."

The following are authorities in support of the above observations:

In *Law* v. *Davis*,(*b*) *A.* bequeathed property "to *B.* and his *heirs male, equally to be divided* between them, share and share alike." *B.* had four children; and although the limitation was not to him for life, yet the Court thought the true construction was to give *B.* the *interest only*, and the principal among the *heirs male* equally, *i. e.* to his children being sons, who alone answered the description.

The case of *Wilson* v. *Vansittart*,(*c*) seems to class under this head, although there were collateral circumstances confirmatory of the intention that children should not take *in præsenti* with their parent, which did not occur in the last authority.

In that case, *James Wilson* bequeathed "to his brother *John*, and to his heirs male, *equally to be divided* among them," his residuary personal estate; excepting out of it 100*l.* for his nephew *John* (who was the *son* of his *brother* John;) and another 100*l.* for his nephew *William Stephenson;* and 800*l.* to be divided among the other grand-children of his father's first marriage. Lords Commissioners *Smyth* and *Bathurst* were clearly of opinion, that according to the construction of the will, the testator's *brother John* took the whole for *life*, with remainder to his sons equally.

The division of the fund equally among heirs male, clearly showed, for the reasons before detailed, that the testator used the words "heirs male" in the sense of male children, the construction being so settled; the case of *Law* v. *Davis* is an authority for their taking in remainder, after the death of their father, to whom a life-interest in the fund was impliedly given; an interpretation confirmed by the circumstance of the legacy taken out of the residue for the *son* of *John*, since that *immediate* gift to *a child* of *John* is inconsistent with an intention in the testator for the *other* male children of *John* to take with him the residue *in præsenti* but quite reconcileable with the construction, that *John* was meant to enjoy the residue for *life*, and the male children the capital after his decease.

The last case which will be produced upon the present subject, is a decision on the simple question of a legacy to *A.* and to her heirs; the testator declaring that by the word "heirs," he meant children, and which fully establishes the distinction before noticed, when the word "children," or the word "heirs," explained to mean children, is the term used in the bequest.

The case alluded to is, *Crawford* v. *Trotter*,(*d*) in which the form of a bequest was to this effect: "To Lady *Scott* and to her *heirs*, (say children) I give 1000*l.* three per cent. reduced annuities. At the date of the will, Lady *Scott* had children living; and Sir *John Leach*, V. C. was of opinion, that her ladyship was entitled for *life*, with remainder to her children, and for the following reason: the

(*a*) *Ante*, *p.* 70.
(*b*) Cited 1 Ves. jun. 145. from Reg. Lib.
(*c*) Ambl. 562.
(*d*) 4 Mad. 361.

word "heirs," which was *used* as synonimous with children, *imported* that the latter were to take after death.

3. It being always a question of intention as to the meaning of a testator in the use of the word "heirs;" if it appear that the intent was for the heir, properly and technically such, to take the personal estate, there can be no objection to his title. An instance of that intention may occur when a testator blends his real and personal estates together; and, after giving the fund to a person for life, directs that his *next heir* at law shall afterwards succeed to it. In this case, the intention that both estates should be enjoyed together, is apparent; and to *divide* them by giving the one to the next of kin would be contrary to the words; consequently, a court of equity has no alternative but to adhere to the description in the will, and to permit the person answering that description, *viz.* the heir at law to enjoy the *whole*.

Accordingly in *Gwynne* v. *Muddock*,(*e*) Mr. *Morgan* bequeathed to his daughter, *Ann Williams*, all his real and personal estates, to enjoy during her life, and to be enjoyed after her death, by his "next heir." Sir *William Grant* determined in favour of the testator's co-heirs, for the reasons before stated.

The subject which next regularly presents itself for consideration is:

Sect. IV. The persons entitled under Bequests made to "Issue."

1. The term "Issue" is of very extensive import, and when used as a word of purchase, and unconfined by any indication of intention, will comprise all persons who can claim as descendants from or through the person to whose issue the bequest is made; and in order to restrain the legal sense of the term, a clear intention must appear upon the will.

In *Davenport* v. *Hanbury*,(*f*) the bequest was "to *Mary Davenport* or her *issue*." *Mary* died before the testator, leaving a son and two grand-children, the descendants from a deceased daughter. Lord *Alvanley* decided that the grand-children were entitled with the son, observing, there was no doubt that the word "issue" had ever been considered as embracing other objects than children. He also determined, that they took in joint-tenancy.

And in *Freeman* v. *Parsley*,(*g*) Lord *Rosslyn* made a similar decree. There the testator devised a moiety of his real and personal estates, in trust for his half-sister *Elizabeth Rogers*, and in case of her death, to be divided among her lawful *issue*. The other moiety he gave in trust for his five cousins equally, naming them, and in case of any of their deaths, in trust as to their shares for their lawful *issue* equally, and in default of such *issue*, for the survivors in equal shares. *Elizabeth* and two of the cousins died before the testator, leaving children and grand-children. Some of the parents of the grand-children were living and others dead; of the latter, part died before, and the remainder after, the death of the testator; but all the grand-children were born during his life. They therefore being

(*e*) 14 Ves. 488. (*f*) 3 Ves. 257.
(*g*) 3 Ves. 421. and see *Leigh* v. *Norbury*, 13 Ves. 340. 344. *S. P.*

in existence when the funds were distributable, claimed under the description of *issue* of the original legatees, in the following manner: grand-children, whose parents died during the life of the testator, claimed the proportions their respective grandmothers would have been entitled to, if they had survived him. Those grand-children, whose parents out-lived the testators, (some of whom were living and others dead,) and consequently took vested interests, claimed equal shares *with* their parents in the proportions of the trust funds which their grandmothers would have been entitled to, had they been in existence. And Lord *Rosslyn* was of opinion, that the claims of the grand-children were well founded, and decreed accordingly.

So also in *Bernard* v. *Montague*,(*h*) portions were provided by will for the testator's daughters, to be vested at a future and uncertain period; with a proviso, that if any of them previously died, leaving *issue*, such issue were to take their parents shares. All the daughters died during the life of the testator, except one named *Margaret*, who was married, and when she died, which was shortly after the testator, it was doubtful whether the event had happened, upon which her portion was to vest; so that an inquiry was directed. She left three children, two of whom died in infancy, and the third, called *Rebecca*, died, leaving four children, *grand-children* of *Margaret*. And with respect to their interests, supposing the result of the inquiry to be, that the portion did not vest in *Margaret*, Sir *William Grant* said, "I am of opinion, that there is nothing in the clause, directing the portion to go over in that event, which should confine its operation; but that the grand-children, as well as the children, will be entitled under the general description of "issue."

2. The preceding cases show the sense in which the word "issue" is to be understood, when unexplained. And it may be proper to observe, that when it appears clearly to be a testator's meaning to provide for a *class* of individuals *living* at the date of his will, and he provides against a lapse by the death of any of them in his life-time, by *substitution* of their *issue;* in such a case, although that word will include all the descendants of the designated legatees, yet if any person, who would have answered the description of an original legatee, when the will was made, be then dead, leaving *issue*, that issue will be excluded, because the issue of those individuals only who were capable of taking *original* shares at the date of the will, were intended to take by substitution; so that as the person who was dead when the will was made, could never have taken an original share, there is nothing for his issue to claim in his place. To exemplify this:

Suppose *A.* to bequeath a legacy to the children of *B.* which he *now* has by *C.* his wife, but if any of them die before *A.* their shares shall go to their lawful *issue*. Should a child of *B.* happen to be dead when the will was made, leaving *issue*, that issue can take nothing for the reason before mentioned.(*i*)

3. Although "issue," when abstractedly considered, is of so exten-

(*h*) 1 Meriv. 424–434.
(*i*) See *Christopherson* v. *Naylor*, 1 Meriv. 320. stated *ante*, p. 46.

sive an import, as to include all the descendants of the object described, yet when it can be collected from the will, that a testator in using the word, did not intend it should be understood in its common acceptation, the import of it will be confined to the persons whom it was intended to comprehend. Or, in the words of Lord *Eldon*, "if upon fair reasoning, deduced from the words of the will, all the contents and the design and tenor of it, as manifested by its contents, show the word "issue" to be meant in a more restrained sense, that sense may be given to it."(*k*) From these remarks, it appears not only that the intent to restrain the legal import of the term "issue" must be clear, but also that evidence of such intention, independent of the will, is inadmissible. With respect to authorities, in support of the above observations:

In *Horsepool* v. *Watson*,(*l*) lands were devised to *James Horsepool* and his wife *Mary* for life, remainder, after the death of the survivor, to trustees, to sell, and apply the produce among all the *issue*, *child or children*, male or female, of *James* by his wife *Mary*, and their representatives, equally. At the death of the survivor of *James* and *Mary*, there were several children, one of whom, a daughter, having survived the testatrix, died during the life of the survivor of her parents, having first married, and left children. There were also other grand-children of *James* and *Mary;* and the question was between the surviving children, the grand-children, and the husband of the deceased child, who claimed as her administrator. The *Chancellor* determined two points: first, that the testatrix had restrained the general import of the word "issue" by the terms "child or children" immediately following, so that grand-children, whose parents were living, could not take *with* their parents under the original bequest. And secondly, that the grand-children whose mother died before the survivor of *James* and *Mary Horsepool*, were entitled in preference to their father, claiming as the mother's administrator; because the testatrix had shown her sense of the word "representatives" by the term "issue," viz. representatives, *being issue*.

In the following case of *Sibley* v. *Perry*,(*m*) Lord *Eldon* considered the contents of the will as affording that species of evidence of the testator's meaning, which was sufficient to restrain the word "issue" to the sense of children.

That case consisted of a variety of legacies; the first of which was a bequest of 1000*l.* in the three per cent. consols to each of the testator's relations, *John*, *Robert* and *Mary Dixon*, if living at his death; but in the event of all or any of them previously dying, he willed "that the lawful *issue* of every one of them so dying should equally have and enjoy the 1000*l.* stock, which their respective *parents*, if living, would have had." And Lord *Eldon* said, that as the word "parents" must be understood father or mother, which more clearly appeared from the next legacy, the correlative term "issue" must be taken in the sense of children.

The second bequest just referred to, was of a like sum of money given to *John Dixon*, "if living at the testator's death, and to his lawful *issue* equally, if *he* the *parent* should then be dead." His

(*k*) 7 Ves. 531. (*l*) 3 Ves. 383. (*m*) 7 Ves. 522.

Lordship observed, it was certain that the testator did not mean grandfather by the word "parent." By referring to *John Dixon* as parent, he showed his sense of the expression to be the father, and that he intended by the term "issue" the children of *John*.

And thirdly, the testator proceeded to give three legacies to the "issue" of persons whom he supposed to be dead. The first was bequeathed "to each lawful *issue* who might be alive at his death of his father's sisters, whose names were *Martha*, *Mary* and *Rebecca*, to each of them living, and lawful *issue* 140*l.* stock." The second was "to each of the lawful *issue*, and also to the widow of the late *Thomas Denson*, 130*l.* stock, if living at my decease." And the third was given in similar terms to the *issue* of the late *Robert Denson*. Next followed legacies to parents and their *children*, to a widow and her *daughter*, to a *son* whose parents were dead; and to the *daughters* of the defendant *Sibley*. Lord *Eldon* considered the three legacies given to "issue" as well as the preceding to be intended for children only; because the clauses in the will by which the prior bequests were made, showed that the testator meant the word "issue" in the sense of children alone. Added to which, the whole tenor and design of the instrument confirmed that intention, for the testator appeared from it to have designed to give to *children* generally under different descriptions: 1st, by the word "issue;" and 2dly, by the words "children" and "daughters;" by which the general term "issue" was explained and restricted, as in the before stated case of *Horsepool* v. *Watson*. His Lordship finally declared, that upon the true construction of the will, and the whole of it taken together, the testator, by the words "lawful issue," meant "children;" according to which the distribution ought to be made.

The distinctions noticed in the last section upon the subject of the word "heirs," being construed to mean children, equally apply to the term "issue." So that if a bequest were made to *A.* and his issue, with a power for *A.* to *appoint* among them; or if the property were given to the issue as *tenants in common*, or to them, their *executors*, administrators and assigns, the word "issue" would be construed synonimous with children, letting in grand-children, &c. who answer the description of issue.

In addition to the cases stated and referred to in the last section, is the authority of *Hockley* v. *Mawbey*,(*n*) in which *John Russell* devised freehold and leasehold estates "to his wife for life, remainder to his son *Richard*, and his issue lawfully begotten or to be begotten, *to be divided* among them as *Richard* should *think fit*." Lord *Thurlow* said, it was clear that issue were not intended to take as heirs in tail, but *distributively*, and in proportions to be fixed by the son; and that by the word "issue," children and descendants from the son, however remote, who might come into existence during his life, would take vested interests, subject to his appointment of the proportions each should have in the property.

(*n*) 1 Ves. jun. 143–149.

Our next inquiry will be,—

Sect. V. The persons entitled under a bequest to "Relations."

When the terms adopted by a testator in reference to the objects of his bounty, are so large that the Court cannot discriminate any particular persons intended to be benefited, as in the instance of a legacy to "relations" generally, or to "relations by blood or marriage," without enumerating any of them; the Court, in order to perform the intention by giving effect to the bequest, will direct the money to be paid to such of the testator's relatives as would be entitled under the Statute of Distributions in the event of intestacy,(*o*) including those of the *half* blood equally with those of the *whole*.(*p*) Lord *Thurlow* observed in relation to this rule, that "when, first, cases of this description came before the Court, it said, that to avoid inconvenience, the best way was to adhere to the statute: that the first cases probably were those where testators, having exhausted the persons whom they meant as objects, intended the rest for the individuals to whom the *law* would give it.(*q*) The principle then, upon which a Court of Equity resorts to the Statute of Distributions to ascertain the legatees, is necessity, in consequence of particular objects not having been pointed out by testators. In all such instances, the statute regulates the *degree* as also the *proportions* in which the legatees are to take, subject as to the latter, to this modification: that if the will specify the *shares* into which the fund is to be divided, so far the statute will be superseded, and the division must be made according to the will, among the legatees, either *per capita*, or *per stirpes* and *capita*, as will appear from the cases which will be afterwards produced. But that relations more remote than those included within the statute were intended, cannot be shown by *parol* evidence; for the sense of words as fixed by *legal authority*, is not to be altered by language held on any occasion by testators, or by their behaviour.(*r*) We shall proceed to consider,—

1. The authorities by which it was established, that under a bequest to "relations," none were entitled but those who, in case of intestacy, could have claimed by the Statute of Distributions.

In *Roach* v. *Hammond*,(*s*) the testator devised his real and personal estates to the defendant "for the use of his *relations*;" and the Court decided that the persons to take, and the proportions, were to be determined by the Statute of Distributions; the *Chancellor* remarking, that he thought it the best measure for setting bounds to such general words. Again,—

In *Thomas* v. *Hole*,(*t*) the testator bequeathed 500*l*. "to the *relations* of *Elizabeth Hole*, to be *equally divided* between them." When the testator died, *Elizabeth* had two brothers living, and several nephews and nieces, the children of a deceased brother. Lord *King* determined two points. First, that no relations should take under the above description, who were excluded by the Statute

(*o*) 22 & 23 Car. II. chap. 10, explained by 29 Car. II. chap. 30.
(*p*) *Cotton* v. *Scarancke*, 1 Mad. 45.
(*q*) 1 Bro. C. C. 33.
(*r*) 1 Bro. C. C. 33.
(*s*) Pre. Ch. 401
(*t*) Forrest, 251. and see *Masters* v. *Hooper*, 4 Bro. C. C. 207. *S. P.*

of Distributions; and, secondly, that the distribution should be *equal* among the persons included in the statute *per capita* as directed by the *will;* so that each of the nephews and nieces was entitled to the same share as each brother; a division contrary to the statute, which directs that the children of deceased brothers and sisters shall only succeed to the shares of their parents.

And in *Green* v. *Howard*,(*u*) the testator gave 4000*l.* to his wife for life, remainder "to his own *relations*, who should be then alive." There were several legacies in the will to first and second cousins; and it was in evidence, that the testator was accustomed to receive his second cousins with equal kindness as the first. The *second* cousins therefore claimed to participate with the first in the legacy of 4000*l.* But Lord *Thurlow*, C. decided against the claim, and rejected the evidence to explain the *legal sense* of the word relations.

The last case appears to be an authority for the proposition, that the gift of the legacies to relations in a degree farther removed than those entitled under the Statute of Distributions, will not be sufficient to include them in a bequest to "relations" upon the ground of presumptive intention. The principle seems to be this: that when a rule has once been established, it is most eligible to adhere to it, and not to permit exceptions upon mere conjecture or refined speculation. Lord *Thurlow*, acting upon that principle in the next case, as in the last, determined, that although the testator *excepted*, out of a bequest to relations, a nephew, whose mother was living, such circumstance was insufficient, upon presumed intention to let in other nephews and nieces of living parents to take with the testator's surviving sisters and the children of his deceased brother.

Thomas Mowbray(*x*) devised his real estate in trust for his wife for life, directing his trustee to sell the lands after his wife's death, and "to divide and pay the proceeds to and among *all* and every such person and persons *who should appear to be related to him* (the testator) *only*" in equal shares (*except his nephew, John Wood.*) The question was, whether any persons could take shares of the property but those who were entitled under the Statute of Distribution? The claimants were surviving sisters of the testator, children of a deceased brother, and children of *surviving* sisters; and it was insisted for the latter children, that the testator, in *excluding the nephew*, whose *mother was living*, and who consequently was not one of the next of kin of the testator, *clearly* intended to comprise individuals in the term relations, who were allied to him in the *same degree* as the excluded nephew. But Lord *Thurlow* was of a different opinion, for the reasons before mentioned.

Lord *Rosslyn* also adhered to the rule in *Devisme* v. *Mellish*,(*y*) in which the testator bequeathed 50*l.* for a mourning ring "to each of his *relations by blood or marriage.*" The question was, what relations were entitled? It was contended, that the word "relations" must be confined to the Statute of Distributions, and to persons who had married relatives entitled under that Act. And so his Lordship decreed.

It may be proper to notice, that the rule has not been confined to a court of equity, but has been adopted by a court of law in regard

(*u*) 1 Bro. C. C. 31. (*x*) *Rayner* v. *Mowbray*, 3 Bro. C. C. 234. (*y*) 5 Ves. 529.

to freehold estates. *Mansfield*, C. J. of the Court of *Common Pleas*, observing, that since the word "relations" was held to mean in a court of equity, those persons who were entitled under the Statute of Distributions, he did not see why it should not receive the same construction in a court of law.(*z*)

As the same uncertainty in the description exists in the words "to my, or who are, my *near* relations;" the generality of the expressions will be restrained to persons entitled under the Statute of Distribution.

Thus, in *Whithorne* v. *Harris*,(*a*) Mrs. *Withorne* bequeathed in these words: "I give to all and every person and persons who are *near* relations to me, if any such there be, 250*l.* to be paid within a year after my decease; but if there be any such person or persons who are related to me, and do not apply for payment within that time, then I give the said sum to my executors." No nearer relations than *first* cousins applied within the year, yet a question arose whether *second* cousins were not included as "*near* relations?" And Lord *Hardwicke* declared, that the testatrix's next of kin were alone entitled, and ordered the legacy to be paid to the *first* cousins.

The particular objects intended by a testator, are rendered a little more certain by his prefixing the word "poor" to that of "relations." The Court, therefore, has not implicitly followed the Statute of Distributions in this instance; but as Lord *Thurlow* observed in *Green* v. *Howard*,(*b*) it has shown particular favour to one or more relations, according to their greater need. Suppose then, a legacy be given to the testator's "poor" or "necessitous" relations, the Court would so far adhere to the statute, as to limit the number to his next of kin, and depart from it in distributing the property among such of that number as were *poor*, and in want of assistance in exclusion of the rest.

In an *anonymous* case,(*c*) a testator bequeathed the surplus of his personal estate to his "poor relations." The question seems to have been, whether the Countess of *Winchelsea*, who was one of the next of kin, and whose circumstances were greatly *inadequate* to the support of her rank, was entitled to a share of the residue under the description of a *poor* relation, and it was determined in the affirmative.

Notwithstanding the observation of the reporter at the foot of the case, it would seem that the decision is perfectly correct. The objects were to be *poor* relations. The countess not only answered the description, but was also one of the testator's next of kin. There appears, therefore, to have been no good reason to exclude her from a share of the residue.

The last case was followed by Sir *Thomas Sewell*, M. R. in *Brunsden* v. *Woolredge*,(*d*) in which the testator directed, that after the death of his two brothers, without having children, a sum of 500*l.* "should be equally distributed among his mother's *poor* relations." The brothers died without children; and the mother's next of kin

(*z*) See *Doe* v. *Over*, 1 Taunt. 263–269. *String ex dem. Titcher* v. *Biles*, 1 Term Rep. 435. 438. in a note. (*a*) 2 Ves. sen. 527. and see 19 Ves. 403.
(*b*) 1 Bro. C. C. 31. and see 2 Ves. sen. 87–110. (*c*) 1 P. Will. 327.
(*d*) Ambl. 507. 1 Dick. 380. *S. C.*

were nephews and nieces. There were also *great* nephews, &c. And the question was, who were entitled under the above description? It appears from *Dickens*, whose report corrects that of *Ambler*, that Sir *Thomas Sewell* limited the number of relations according to the Statute of Distributions, and divided the fund among the poor of that class; consequently, grand-nephews, &c. (not being within the statute) were excluded. Mr. *Dickens* thus reports the words of that Judge:—"The question in the cause is, who are *poor* relations? *Relations* must be confined to next of kin; and *poor* relations must be such as *want assistance*, and are *next of kin* according to the statute."(*e*)

Since it appears to be the sole intention of the testator to make provision for his *poor* relations, it necessarily follows that claimants to be successful must answer that description when the fund is to be distributed; for if a relation who was poor, become *rich* before the period of division, he will be excluded.(*f*)

The same rules of construction seem to apply when the terms of bequest are "to my most *necessitous*" or "*poorest*" relations, as to "my *poor* relations." It appears convenient to adopt the statute in fixing the number of relatives, and then to divide the fund among the most indigent individuals in that number, when there are more persons than one answering the description of next of kin; for it would seem from the case next stated, that if the next of kin were only *one* individual, he would take the whole.

In *Widmore* v. *Woodroffe*,(*g*) the testator *Widmore* directed a third part of his residuary personal estate "to be distributed among the *most necessitous* of his relations by the father and mother's side." The question was, whether *Mary Woodroffe*, the sole next of kin of the testator, should take the whole third; or whether two other persons in a more remote degree of kindred should participate with her? For the two latter persons, the word *necessitous* was relied upon, together with the direction for a *distribution* of the fund. But Lord *Hardwicke* was of opinion, that the statute was to be adhered to, and that *Mary*, being sole next of kin, was alone entitled.

It is observable in the last, as the former case of *Woolredge* v. *Brunsden*, the legacies were to be *distributed* among "poor," and "most necessitous" relations, but *by whom* is not mentioned; so that no special confidence was placed in any particular person to make a selection of the objects, an omission which distinguishes the two cases from those to be afterwards stated. Since therefore the relations to take under the above descriptions were to be ascertained by a court of equity, it, as usual, called in the assistance of the Statute of Distributions.

The term "relations" will be equally confined to the limits of the statute, where a *power* is delegated to a person to fix the amount of the share that *each* relation is to take, without entrusting him with a selection of the objects; for in such a case, the act appoints the persons, viz. "the next of kin" in existence at the *death of the testator*. They *then* take *vested* interests, subject only to be altered in amount

(*e*) See distinction by Sir *William Grant*, 17 Ves. 374.
(*f*) 1 Scho. & Lefroy, 111.
(*g*) Ambl. 636.

by an exercise of the power, which if not at all, or not, *legally* executed, a court of equity will direct the property to be divided among them according to the statute, in exclusion of such of them as may afterwards happen to answer the description, at the death of the donee of the power.

Thus in *Pope* v. *Whitcombe*,(*h*) *James Childe* bequeathed his residuary estate to his wife for life, remainder to his son absolutely, if he attained the age of twenty-one, but if he died before that period, and without issue, the testator, after giving some legacies, directed his wife to dispose of the residue "among his *relations*, in such manner as she should think proper." The contingencies happened upon which the power was to arise, and the wife not having made a good appointment in consequence of distributing the fund among persons not within the statute, Sir *W. Grant*, ordered it to be divided among the next of kin of the testator *at his death*.

We shall next consider:

2. When the indefinite term "relations," will be permitted to comprise relatives more distant than those mentioned in the Statute of Distributions.

In treating of the subjects belonging to this sub-division, we shall consider them as *exceptions* to the general rule, that in bequests to relations, none but next of kin are entitled; and the exception with which we commence, shall be—

First, where the terms of bequest are to "*poor* relations."

It appears from the cases before stated, that a legacy to "poor relations" is to be regulated by the Statute of Distributions; but the authority about to be produced is an instance of an apparently similar bequest, which was holden to comprehend relatives more remote in degree than those within the limits of the Statute of Distributions. To reconcile this with the former cases, recourse must be had to a distinction which exists, when a legacy is given to "poor relations," as a *charity* to be continued and enjoyed by persons in succession answering the description, and when it is given among individuals, required at the period of distribution, to be "*poor* relatives," and that distribution is to be once only and final. In the latter case, it has been shown, that the statute regulates the number and degrees of relations to take under such a description; but in the former, unless a court of equity were to consider the bequest in the class of *charitable* dispositions, it would be void, as preventing the circulation of personal property beyond the limits allowed by law. When therefore it appears from the will, that a testator intended to appropriate a sum of money not only for his *then* existing poor relations, but for those to succeed without limitation as to time, a court of equity will support the bequest *as a charity;* and admit, without regard to the Statute of Distributions, *all* the testator's poor relations of his own blood, to be ascertained by a master of the Court, upon a plan or scheme laid before him.

Thus, in *White* v. *White*,(*i*) the legacy was of 3000*l.* stock, for the purpose of putting out "our poor relations" apprentices. Sir *Wil-*

(*h*) 3 Meriv. 689.

(*i*) 7 Ves. 423, and see *Isaac* v. *De Friez*, in a note, 17 Ves. 373, incorrectly reported in Ambl. 595.

liam Grant, M. R. supported the bequest as a charity, which would otherwise have been void for the reason before mentioned.

His Honour also made a similar decision, and for the same reason, in the *Attorney General* v. *Price*,(*k*) upon the following bequest: "Also that at what time soever the possession of the same premises shall come to him by virtue of this my will, yearly from thenceforth he, the said *Evan Johnes*, and his heirs shall *for ever* divide and distribute according to his and their discretion, among my *poor* kinsmen and kinswomen, and *among their offspring and issue*, which shall dwell within the county of *Brecon*, the sum of 20*l.* by the year, without fraud and collusion." An inquiry was directed after *all* the testator's poor relations within that county.

SECOND. Another exception to the general rule will happen when a testator has delegated a power to an individual to distribute the fund among his (the testator's) relations, according to his discretion. In such an instance, whether the bequest be made to "relations" generally, or to "poor," or "poorest," or "most necessitous" relations, the person may exercise his discretion in distributing the property among the testator's kindred, although they be not within the Statute of Distributions.

Accordingly, in *Mahon* v. *Savage*,(*l*) the testator gave to his *executor Savage* 1000*l. to be distributed* among his *poor* relations, or such other objects of charity as should be mentioned in his private instructions to his executors; but of which there was no appearance. Upon a reference to the Master to inquire who were the testator's poor relations, he reported a number exceeding fifty, many of whom were related to him beyond the degree prescribed by the Statute of Distributions. Lord *Redesdale* held, that the intention was charity, and the gift, not to relations merely, but to relations as objects of charity; and that the executors had a *discretionary* power of appointment, so as not to be under the necessity of including *all* the testator's poor relatives; and it appears from the decree referring to the Master's report, that the executors were not restrained, in the exercise of their discretion, to relations within the Statute of Distributions; for they were to be at liberty to lay before the Master a plan for distributing the fund among the poor relations named in the report, *according to their discretion.*

So in *Spring* on the demise of *Titcher* v. *Biles*,(*m*) the testator empowered his wife to dispose of his residuary real and personal estates by will "to and among *such* of his relations as should be living at his death, in such shares as she should think proper." The wife appointed the lessor of the plaintiff, who was a relation of the testator, but not within the Statute of Distributions; for which reason it was contended that the appointment was void. But the Court of King's Bench were of a different opinion; holding that the power was discretionary, and might be exercised in favour of *any one* relation.

And if a suit in Chancery be instituted for the administration of assets under the direction of that Court, it will ascertain the number of relations, and order the property intended for them to be dis-

(*k*) 17 Ves. 371. (*l*) 1 Scho. & Lefroy, 111, and see 16 Ves. 43.
(*m*) 1 Term Rep. 435, 8vo. ed. in notes.

tributed among such of them, and in the proportions the executors or other persons entrusted with the selection shall propose, in a plan approved of by a Master. This was done in the case of *Mahon* v. *Savage*, before stated.

So in *Bennett* v. *Honeywood*,(*n*) the testator bequeathed 20,000*l.* by a codicil to his executors, in trust to *distribute* and dispose of, "among such of his relations by consanguinity, and not by marriage, as should not appear to them to be worth, each person more than 2000*l.* and who should apply for shares within two years after his death: the distribution to be made among such of his relations as aforesaid, at the times, and in the manner and proportions, or disproportions, as his executors in their discretion should judge to be most proper:" those circumstances being referred entirely to the judgment and discretion of his executors. There were many claimants: and Lord *Camden*, C. ordered a Master to ascertain the number of relations entitled under the codicil, and then directed the distribution of the legacy to be made *by* the *executors* according to their own judgment and discretion, provided they allotted *some* share to each person entitled to the money.

This power and discretion to executors or trustees is a *personal* trust or confidence reposed in them as individuals, and not a ministerial duty flowing from that office, and therefore cannot be delegated to another. When the authority, therefore, is given to two or more persons, without mentioning the survivors, and *one* of them dies or declines to act, it cannot be exercised by those who remain, either alone or even with the concurrence of a new trustee appointed by the Court of Chancery in the place of the deceased.(*o*) And if the power be given to the *survivor* of two executors or trustees, without naming his executors, and he die before exercising it, the authority will determine, since his executors are not entrusted with the execution of the power;(*p*) which being *personal*, the persons to exercise it must be *quasi personæ designatæ* of the testator, as the executors of a surviving executor or trustee *may* be when nominated by the original testator. But the representatives so designated must precisely answer the description and intention of the will, or the power will fail. To illustrate this: Suppose a testator to appoint *A.*, *B.* and *C.* his executors and trustees, with a *power* for them, and the survivors, and the *heirs*, *executors*, and administrators of the survivor, to distribute his *real* and *personal* estates among such of his relations as they in their discretion shall think proper: that *A.*, *B.* and *C.* died without executing the power, and that *C.* the survivor passed the trust-property by will to trustees for the only and express purposes of the will of the original testator, nominating them also executors for those objects, and appointing other executors of his own property. In such a case the power would be extinct by the death of *C.*; because it having been at first given to the same persons uniting in themselves the offices of executors and trustees, to whom were given both funds for the sake of discretionary distribution, it is required that those who succeed them for

(*n*) Ambl. 708.
(*o*) *Doyley* v. the *Attorney General*, 4 Vin. Abr. 485. pl. 16. 7 Ves. 58. in note, *S. C.*
(*p*) *Flanders* v. *Clark*, 1 Ves. sen. 9.

the purpose of executing the power should be both heir and executors, and not that the land should go to one as *heir*, and the personal estate to others as *executors;* so that in the case supposed the trustees of *C.* could not execute the power, because it was incapable of delegation, and none of them was the heir of *C.:* neither could it be exercised by the heir of *C.* for he was not also executor; nor could it be executed by the executors of *C.* because no one of them was his heir. When the power fails under such or any other circumstances, the object of the devise will not be disappointed; for the disposition is a mixture of *trust* and *power*, and the extinction of the latter does not affect the former. A court of equity, therefore, will perform the trust expressed to be for *relations*, and distribute the funds in the degrees and proportions mentioned in the Statute of Distributions, among the testator's next of kin in existence *at the death of the donee* of the power, and not of the testator; because, until appointment or the death of the donee of the power, no relatives take vested interests in the property, but the whole is contingent; and who may be the persons entitled, whether those included or not included within the Statute of Distributions, or both, is a point of absolute uncertainty. In *Cruwys* v. *Coleman*,(*q*) Sir *William Grant* observed, that "according to *Harding* v. *Glyn* (after stated), where a *power* of *selection* is given in favour of the testator's own relations, and that power is not executed, the property undisposed of, will go to the next of kin, *at the death of the party who had the power.*

All these points were considered in the recent case of *Cole* v. *Wade*,(*r*) where the testator *Booth* gave all his real and personal estates to Messrs. *Ruddle & Wade*, whom he appointed executors of his will, their executors, administrators and assigns, upon the trusts of it, and particularly as to *all* the residue of his real and personal estates, to dispose of them for the benefit of "*such* relations and kindred *as they should think proper.*" And after they were ascertained by sufficient evidence, he ordered his *trustees* and *executors* to convey and dispose of both funds "unto and among *such* of his relations and kindred, in the proportions, manner, and form as his said executors should think proper;" at the same time recommending the *greatest* share to be given to the persons whom they should think to be his nearest relations; but he declared that he did not mean by such recommendation to control the *discretion* of his executors and trustees, it being his intention that such discretion "in his said trustees and executors, and the *heirs, executors and administrators* of the *survivor* of them," should be absolute in every particular relating to that disposition, as well to decide who were relations, as the proportions they should be *respectively* entitled to in the residue. *Wade* survived his co-executor and trustee, and devised all the property to Messrs. *Bray*, two trustees, for the purposes expressed in the will of Mr. *Booth*, and whom he made executors for those objects solely. Under these circumstances, Sir *W. Grant* decided—1. That the power being confidential and personal, was gone by the death of the surviving executor and trustee. 2. That it could not be delegated, and consequently the will of the surviving

(*q*) 9 Ves. 325. (*r*) 16 Ves. 27–43.

executor and trustee was so far inoperative. 3. That the defect was not remedied by the original testator declaring the discretionary power to belong to the "heirs, executors and administrators" of the surviving trustee, because he intended the heirs and executors or administrators of such trustee to be the *same* person or persons, which appeared from the original trustees and executors being the same individuals, their interests and powers being co-equal and co-extensive; so that the trustees in the will of the surviving executor and trustee of Mr. *Booth*, not being his heir, did not answer the description in Mr. *Booth's* will, and could not execute the power. 4. That the distribution of the property should be made by the Court: and lastly, That the objects of distribution were "next of kin" living *at the testator's death.*

The decision upon the last point can only be reconciled with preceding determinations, and his Honour's own declaration in *Cruwys* v. *Coleman* before mentioned, under the supposition that the trustees and executors had not the power of selecting the objects, but merely of apportioning the shares, a construction which it may be thought difficult to support upon the will last stated.

The case of *Harding* v. *Glyn*,(*s*) is a principal authority upon the subject of the present exception. The bequest after the death of the testator's wife, (to whom he gave a leasehold house, and several articles of personal estate for life,) was, "unto and among *such* of his own relations as she should think most deserving and approve of." The wife appointed the house by will, to a Mr. *Swindell*, who was related to the testator, but not within the Statute of Distributions, and she made no appointment of some parts of the personalty. The "Master of the Rolls" determined first, that the appointment of the house was valid, although the appointee was not one of the testator's next of kin: secondly, that the personalty undisposed of was to be distributed by the Court under the Act; and lastly, that the objects of distribution were next of kin of the testator, *at the death of his wife*, the donee of the power.

The next case of *Gower* v. *Mainwaring*,(*t*) shows that there is no distinction between a will and a *deed* upon this subject.

There Mr. *Mainwaring* by *deed*, directed his trustees (three in number,) to give his residuary real and personal estates "among his *friends* and *relations*, where they should see *most necessary*, and as they should think most equitable and just." Two of the trustees died, and the third declined to act. Lord *Hardwicke* ordered the fund to be divided between a brother and nephew of Mr. *Mainwaring*, according to their necessities and circumstances with the approval of a Master of the Court.

Third.—It is presumed that a further exception to the rule which confines the word "relations" to next kin, may occur where a testator has fixed a *certain* test, by which the number of relatives intended by him to participate in his property, can be ascertained. In such a case, as there exists no impracticability to execute the intention, it should seem that a court of equity would distribute the

(*s*) 1 Atk. 469. and stated from Reg. Lib. 1738, A. 5 Ves. 501. and see *Doyley* v. *Att. Gen.* 4 Vin. Abr. 485. pl. 16. *S. P.*

(*t*) 2 Ves. sen. 87. 110.

funds among *all* the testator's relatives answering the description, although some of them might happen not to be within the degree of the Statute of Distributions.

Suppose, then, a legacy to be given to such relations of the testator as should not be worth 500*l.* It is inferred from the case of *Bennett* v. *Honeywood*,(*u*) and for the reasons before mentioned, that the kindred of the testator, establishing before a Master, that their property is within the standard sum, will be entitled to shares of the bequest, without regard to the limits prescribed by the Statute of Distributions.

FOURTH.—The principle of the last exception, establishes another, viz. where a testator has shown an intention in his will, (for it cannot be done by *parol* evidence)(*x*) to comprehend relations more remote than those entitled under the statute; in that case his intention will prevail, because the statute is only substituted from necessity, as before noticed.

Thus in *Greenwood* v. *Greenwood*,(*y*) a testatrix bequeathed her residuary estate to be divided between her *relations*, *i. e.* the *Greenwoods*, the *Everits*, and the *Dows*. The *Everits*, although not related to the testatrix within the statute, were permitted to take jointly with her next of kin, the *Greenwoods* and the *Dows*, for the term relations is explained by the context of the will, and extended beyond the confines of the statute.

We proceed to consider—

3. When the word "relations" or "relation" may be so qualified as to *exclude* some of the next of kin from participating in the bequest; and this will happen when the terms of bequest are to "*nearest* relations." The only ambiguity of those words arises from the omission of the testator to name the individuals who answer the description; but this obscurity is removed with the same facility as in discovering who are next of kin in cases of intestacy. There is, therefore, no necessity for a court of equity to resort to the statute, to give partial effect to the intention of the testator; so that, whosoever is the *nearest* relation will be entitled to the legacy, in preference to all others, although some of them would have been admitted under the statute, if there had been an intestacy. As an example:

In *Smith* v. *Campbell*,(*z*) Mr. *Smith* while stationed in *India*, bequeathed that his residuary property should be "equally distributed among his *nearest* surviving relations." He left at his death a brother and sisters, and nephews and nieces, the children of a deceased brother. And Sir *W. Grant*, M. R. decided, that the brothers and sisters, as *nearest* of kin to the testator, were entitled in exclusion of the nephews and nieces.

In a prior case of *Marsh* v. *Marsh*,(*a*) Lord *Rosslyn* made a similar determination. There Mr. *Milbourne* bequeathed the residue of his personal estate upon a contingency (which happened) unto his "nearest relation." The claimants were a half sister, and the children of a deceased half-brother. His Lordship decreed the whole

(*u*) Ambl. 708–710. (*x*) Ambl. 71. 1 Bro. C. C. 33.
(*y*) 1 Bro. C.C. 32. in a note, and on this subject see *Stamp* v. *Cooke*, 1 Cox, 235.
(*z*) 19 Ves. 400. Coop. 275. *S. C.* (*a*) 1 Bro. C. C. 293.

fund to the half-sister, as being more nearly related to the testator than the children of the half-brother.

It was remarked by Lord *Rosslyn* in the last case, and decided by by Sir *W. Grant* in the one stated before it, that if there had been more persons than one in the same degree of kindred, there must have been a *division* among them, because each would have been *nearest* relation. Hence it appears, that the word "relation" is (as observed by Lord *Hardwicke* in *Pyot* v. *Pyot*,(*b*) *nomen collectivum* as much as "heir," and when preceded by *nearest* includes all relations in the same degree.

The case of *Edge* v. *Salisbury*,(*c*) has generally been considered as a determination by Lord *Hardwicke*, that *nearest* when prefixed to "*relations*," will not prevent the application of the Statute of Distributions, so as to exclude any of the next of kin from participating in the bequest couched in those terms, although they be not in equal degree of kindred. But it must be conceded to the remark of Sir *W. Grant*, in *Smith* v. *Campbell*,(*d*) that the facts of the case did not require a decision upon such a question, as the testator's nearest relations were nephews and nieces, and *only next of his kin;* so that "Lord *Hardwicke* (as his Honour justly observed) had no occasion to consider whether supposing the next of kin had comprised a larger description of relations, he would have let in *all* the persons who would have been entitled in the event of intestacy, though *not* answering the description of nearest relations."

When the terms of bequest are not confined to "nearest relation," but require the legatee to be of the "name" of a family as thus: "to my nearest relation of the *name* of the *Rowes;*" the relatives must not only be nearest in degree, but must be of the *stock* of the *Rowes*, and entitled to the name as branches of the family. Yet, if the person answering the description of *nearest* relation were a *female*, and originally bore the family name of *Rowe*, which, at the testator's death, or other period of the legacy taking effect, happened to be lost in consequence of marriage; that nominal alteration will not exclude her from the bequest, because the testator, in adopting the word "name," intended to express that his nearest relation, being of the *stock* or *family* of the *Rowes*, and entitled to the appellation of *Rowe* by *birth*, should have the benefit of the legacy. There is no condition requiring the legatee to be of that name when the disposition is to take effect; consequently, as the female relative is the nearest of kin, and originally entitled to, and before marriage called by the name of *Rowe*, her title to the legacy is complete. As an authority for this:

In *Pyot* v. *Pyot*,(*e*) Lady *Withringham* devised her real and personal estates to trustees, for her daughter *Mary* in fee; but if she died before twenty-one or marriage, the trustees were directed to convey and assign those estates to the testatrix's "nearest relation of the name of the *Pyots*" absolutely. The contingency happened, and at that time, as also at the death of the testatrix, her nearest of kin consisted of four individuals, viz. a man and two unmarried sisters of the name of *Pyot*, and another sister who was married at the

(*b*) 1 Ves. sen. 337. (*c*) Ambl. 70. (*d*) 19 Ves. 403.
(*e*) 1 Ves. sen. 336. and see *Mayott* v. *Mayott*, 2 Bro. C. C. 125. ed. by *Belt*.

date of the will, and who was originally of that name, but which she had lost by such marriage. There was also another person of the name of *Pyot* when the contingency happened, but not so nearly related to the testatrix as the persons before mentioned. Who were entitled to the real and personal estates, was the question. And Lord *Hardwicke* determined three points; 1. That "relation" being a noun of multitude, was synonimous with the word "kindred," and comprehended all the *nearest* relations of the testatrix in *equal* degree. 2. That the person not so nearly allied to the testatrix as the brother and sisters already mentioned, was excluded. And 3, that the married sister, being of the *stock* and family of the *Pyots*, and one of her nearest of kin, and originally bearing the family name, was entitled to participate in the fruits of the devise; his Lordship considering the word "name," &c. equivalent to the expression "of the *stock* of the *Pyots*," a description which was answered by the married daughter.

The propriety of the last determination seems to be obvious; for if the mere circumstance of bearing the *name* of *Pyot*, united to the character of *nearest* relation of the testatrix had been considered sufficient within the terms of the devise, without regard to that relation being of the *stock* of the *Pyots;* the necessary consequence would be, that a nearer relation of the testatrix than the brother and sisters of that family might totally exclude them, by the mere assumption of the name of *Pyot*, by Act of Parliament, or under authority of the royal license; a result clearly in opposition to the intention of the testatrix. That intention would be equally defeated by such an interpretation of the word "name," if there were a *female* nearer of kin to the testatrix than the *stock* of the *Pyots*, and she married a *stranger* of the *name* of *Pyot;* by that act she would *literally* answer the description in the will, and exclude all of that family, contrary to the meaning of the testatrix.

It seems, however, to be settled upon sound reason, that where a testator, after prior dispositions, ultimately bequeathes his property to relations, or nearest relations *of his own name*, those only will answer the description who are of his own family, and entitled to bear his name; and that his nearest relations, or relations if not of his name, as just explained, cannot, by legally assuming his name, by Act of Parliament or otherwise, bring themselves within the true description in the will.(*f*)

Sometimes it occurs that a testator requires the person to succeed to his real property, at the conclusion of prior dispositions of it, not only to be the nearest relation of his own *name*, but also of his own *blood*. The senses to be imputed to these two words in conjunction, so as to affix a meaning to each, seem to be these: the word "blood" is to be considered as marking the *stock*, and confining it to the testator's own family; and the word "name" as limiting the objects of that stock to those deducing their title from the *male* line, thereby excluding any of that stock or family claiming to be of kin to the testator by descent from a *female*.(*g*) Hence it appears that the application and sense of the word "name" are qualified by its connec-

(*f*) See *Barlow* v. *Bateman*, 4 Bro. Parl. ca. 194. and the case next stated.
(*g*) 15 Ves. 107.

tion with the word "blood," so as to give to each of those terms a separate meaning and effect.

The subjects now under consideration were fully discussed in the important case of *Leigh* v. *Leigh*;(*h*) Lord *Leigh* having two sisters, the one single and the other *married*, devised his real estate to his sister, *Mary Leigh*, for life, remainder to her first and other sons in tail male; remainder to her daughters in tail general, as tenants in common; remainder to his sister, *Ann Hachet*, for life; remainder to her first and other sons in tail, with the following limitation over: "to the first and nearest of my *kindred* (the same in effect as *relations*) being *male* and of my *name* and *blood*, who shall be living at the determination of the aforesaid several estates, and to the heirs of his body." Both sisters died without issue, and *Mary* was the survivor; at whose death the plaintiff stated that he was the first and nearest of kin to the testator, being a *male*, but was not *originally* of the testator's *name*, although he *assumed* it by the King's license. The question upon demurrer was, whether, under these circumstances, the plaintiff answered the description in the will? And the Court, consisting of Lord *Eldon*, *Thompson*, B. and *Lawrence*, J. determined in the negative, for the following reasons:

1. It appearing from the nature and tendency of the limitations to the sisters and their issue, which, so far as they might take effect, would necessarily occasion a suspension of the name of *Leigh*, or its disuse for ever, should the remainder over be barred by any of those to whom an estate tail was limited; and also from the circumstance of the testator's having made no provision requiring the persons taking under those limitations, on their respectively succeeding to the property, to assume his name, that he had shown no anxiety for its continuance, the testator could not, as the Court considered, mean the word "name" to be confined to the simple requisition that his intended devisee, under the subsequent limitation, (possessing the other qualifications) should be of his name by mere *assumption*, but that he intended to describe by the term, in conjunction with the rest of the description, an individual who should be his first and *nearest* relation of the *male* line, bearing the name of *Leigh* by *inheritance* at the time when the previous limitations determined. 2. That the plaintiff not being so entitled to the name, did not answer the whole description in the will, a defect which could not be cured by assuming the family name by royal authority, and consequently he could not succeed in his claim.

Under the last division of the present section we proceed to observe:

4. That the word "relations" being governed by the Statute of Distributions, no persons can regularly answer the description but those who are of kin to the testator by *blood*, consequently relatives by marriage, are not included in a bequest "to relations" generally. The reason is this; the term "relations" is synonimous with "kindred" mentioned in the statute, a word meaning individuals of the same family and kind with the testator. A wife, therefore, cannot regularly claim under a bequest to her husband's relations, nor a husband as relation to his wife; for although there be a relation be-

(*h*) 15 Ves. 92.

tween husband and wife, it is not of that description which falls within the meaning of the Statute of Distributions.(*i*) Such is the rule when nothing appears from the context of the will explanatory of the sense in which a testator used the word. It must, therefore, receive additional power to exclude relations by *marriage*, when aided by the inference arising from those relatives being provided for by the testator, and the distribution of the property is deferred till their deaths.

Accordingly, in *Davies* v. *Baily*,(*k*) the testator gave the interest of his residuary personal estate to his wife for *life*, and the capital at her decease "to such of his relations" as would be entitled to it by the Statute of Distributions. Lord *Hardwicke* determined upon the intention appearing in the will confirmatory of the general rule, that the executor of the widow was not entitled to any share of the principal residue.

In *Worseley* v. *Johnson*,(*l*) his Lordship made the like decree under similar circumstances. The testator devised certain lands, of which he was seised in fee, to his wife for *life*, remainder to his kinsman, *Ralph Buckwell*, in tail, with remainder to be sold, and the proceeds to be divided among his *relations*, according to the statute. The question was, whether the wife's executor was entitled to compel a sale of the lands, and to receive a proportion of the produce with the testator's next of kin? And the decision was in the negative.

Whether Lord *Rosslyn's* determination in *Maitland* v. *Adair*,(*m*) is to be relied upon may possibly admit of doubt. There the testator, after giving a number of legacies, and most of them to relations, *viz.* a brother, sisters, nephews, nieces, and their children, and 500*l.* to his *brother-in-law*, made the following disposition by a codicil: "My will is, that whatever money, over and above what I have already bequeathed, I may be possessed of at my death, may be divided among my *said* relations by my executors, in the *proportion* I have bequeathed the *other part* of my fortune." His Lordship excluded the brother-in-law from a share of the residue, applying to the case the general rule before mentioned.

It may probably be thought that the last decision militates against the testator's intention as expressed in his will. Before disposing of the residue he had given a legacy to his brother-in-law, and classed him among his own kindred. When then in disposing of his residuary estate, the testator directed it to be divided among his *said* relations, and proceeded to order its distribution among them in the *proportions* he had *before* given the *other part* of his fortune, it seems difficult to conceive upon what principle the brother-in-law was excluded, or how, upon such a construction, the residue could, consistently with the intention expressed in the will be divided in the *proportions* the testator had bequeathed the *other part* of his property, part of that other property having been expressly given to his brother-in-law.(*n*)

The term "relations," being synonimous with "next of kin," a

(*i*) 1 Ves. sen. 84. 3 Atk. 761. 1 Bro. C. C. 31. 294. ed. by *Belt*. 3 Ves. 232.
(*k*) 1 Ves. sen. 84. (*l*) 3 Atk. 758. (*m*) 3 Ves. 231.
(*n*) See Lord *Eldon's* observations, 14 Ves. 382.

description of legatees which will be the next subject of consideration; several of the distinctions and observations appearing under the latter title seem applicable to the one we are just leaving; to which the readers attention is accordingly directed.

VI. Legacies to "NEXT OF KIN."

1. In common acceptation the being of a man's kindred is being of his blood, in which sense the word "kindred" is used in the Statute of Distributions. So that when a man bequeaths "to his own next of kin as if he had died intestate," he is understood to refer to such persons as are related to him by *blood*, and within the degree mentioned in the statute. But it is not necessary that next of kin should be of the *whole* blood, for that is only required in deducing titles to *freehold* estates upon feudal principles; the half-blood therefore answering the description of next of kin, are equally entitled with the whole, and if nearer in degree will exclude the whole blood.(*o*)

2. It follows from these observations, that relations by *marriage* are in general excluded from participating in a legacy given to next of kin; and that neither a husband nor wife answers the description required in a bequest to the next of kin of either of them. This was so determined in *Nichols* v. *Savage*,(*p*) and *Garrick* v. Lord *Camden*,(*q*) upon testamentary dispositions; and in *Watt* v. *Watt*,(*r*) and *Bailey* v. *Wright*,(*s*) where the limitations to next of kin were contained in settlements.

But this is only a *primâ facie* construction which may be repelled by the contrary intention of a testator: accordingly Lord *Eldon* said in *Garrick* v. Lord *Camden*, "it was competent to and required from the Court to look through the whole will, and to see whether *from the whole*, an intention was manifested to include the *wife* among those who were to be taken *more strictly* as next of kin, a description *primâ facie* excluding her." His Lordship then proceeded to remark, that the words "to be divided as if I had died intestate," (omitting the words next of kin) might *upon the whole* admit or even authorize or require such a construction as to let in the widow.(*t*) Hence it follows that the same words in the wife's will, made under a power of similar words in a bequest to her, must also entitle the husband to a share.(*u*)

3. It may be considered settled, that a testator is to be understood to mean by the expression "next of kin," when he does not refer to the statute, or to a distribution of the property as if he had died intestate, those persons only who should be *nearest* of kin to him, to the exclusion of others who might happen to be within the degree limited by the statute. It is true that *Phillips* v. *Garth*,(*x*) determined by *Buller*, J. is a decision in favour of *all* the next of kin, upon the principle that the words "next of kin" had received a technical signification by reference to the statute; so that every testator using them, must be understood to do so in the sense they

(*o*) 1 Ventr. 425. Alleyn, 36. Styl. 74. Mascall's Digest, 61, a very useful little work. (*p*) Cited 18 Ves. 53. (*q*) 14 Ves. 376, 381, 386. (*r*) 3 Ves. 244. (*s*) 18 Ves. 49. (*t*) 14 Ves. 382.

(*u*) See more fully upon these subjects, the law of "Husband and Wife," 1 Vol. 327, 2 Vol. 63. (*x*) 3 Bro. C. C. 64

are used in a case of intestacy; but its authority was materially shaken by Lord *Thurlow*, before whom it was afterwards brought,(*y*) by Sir *W. Grant* in *Smith* v. *Campbell*,(*z*) and by Lord *Eldon* in *Garrick* v. Lord *Camden*,(*a*) and the decision by Sir *Thomas Plumer* in *Brandon* v. *Brandon*, after noticed, appears to have over-ruled it.

The bequest in *Phillips* v. *Garth*, was of a residue to the testator's executors "to be equally divided by them among his *next of kin*, share and share alike." His nephews and nieces claimed the same shares *per capita*, with his surviving brothers; and the decree was in their favour upon the principle before mentioned.

Sir *W. Grant*, in allusion to the last case, and on the present subject expressed himself to the following effect, in pronouncing judgment in the case of *Smith* v. *Campbell*. "Even if the words were *next of kin*, yet if there was nothing to show, that the testator had reference to the Statute of Distributions, or to a division as in the case of intestacy, the inclination of my opinion would be, that the *nearest* in kindred only are entitled; and that brothers and sisters would exclude nephews and nieces from participating in such a bequest. I know the contrary was determined by *Buller*, J. in *Phillips* v. *Garth*, a case which afterwards came before Lord *Thurlow*, but not upon that point; yet the inclination of his Lordship's opinion was so strong against that of Mr. Justice *Buller*, as to induce him to direct the cause to stand over in order that the brothers might have an opportunity of applying to re-hear the cause, but which was compromised. So in the case of *Garrick* v. Lord *Camden*, the Chancellor referring to Lord *Thurlow's* doubt, states his own also with regard to that decision of Mr. Justice *Buller*."

This is a strong opinion that *Phillips* v. *Garth*, is erroneously decided; an opinion which was acted upon by Sir *Thomas Plumer* in the case of *Brandon* v. *Brandon*,(*b*) before referred to; and in which he determined that a surviving brother was entitled in exclusion of the children of a deceased sister, under the words "nearest and next of kin."

But where the bequest is to a legatee (who happens to be nearest of kin to the testatrix) for life, and after his death, to the testatrix's *next of kin*, to be a vested interest in them *at her death*, the legatee for life, though *nearest* of kin, will be excluded, and the persons, next in degree, entitled.

Thus in the recent case of *Bird* v. *Wood*,(*c*) the bequest was of certain funds to trustees in trust to pay the interest to the testatrix's daughter for her separate use for life; and after her decease, to the daughter's appointment by deed or will; and in default of appointment, for the testatrix's *next of kin*, to be considered a vested interest from the testatrix's death except as to any child that might be afterwards born of her daughter. The daughter died without any child, and without executing any appointment. Her husband took out administration to her, and claimed the fund: but Sir *John Leach*, V. C. held, that the persons who, at the testatrix's death, would have

(*y*) 3 Bro. C. C. 69. (*z*) 19 Ves. 404.
(*a*) 14 Ves. 385. (*b*) 2 Wils. C. C. 14. (*c*) 2 Sim. & Stu. 400.

been her next of kin, if her daughter had been then dead without children, were clearly intended. That the daughter could not be such next of kin; for the persons intended were to take at her death; and must have been living at the death of the testatrix; for their interests were then to be vested.

4. If a bequest to next of kin generally will entitle those only who are *nearest* relations in exclusion of others who are next of kin in the sense of the Statute of Distributions, it follows that *nearest* of kin will alone be entitled under a bequest to "next of kin *in equal degree*."

Thus in *Wimbles* v. *Pitcher*,(*d*) the testator gave part of his real estate to his two nieces, one of them being the daughter of a surviving brother. He then bequeathed legacies to his brothers and their children, and to other nephews and neices, and the residue "to his next of kin *in equal degree*, share and share alike." Sir *W. Grant* held, that the surviving brothers were alone entitled; nephews and nieces not being in equal degree with them, and therefore not answering the description.

So also in an *Anonymous* case,(*e*) Sir *Thomas Plumer* made a similar decree upon words of like import.

The subject next proposed is;—

Sect. VII. Legacies to "Legal Personal Representatives," or "Personal Representatives."

The legal construction of the words "personal representatives" or "legal personal representatives" is the *executors* or *administrators* of the person described.(*f*) Consequently, if a legacy were given to *A.* and his personal, or legal personal, representatives, the absolute interest must vest in *A.* But if no bequest be made to *A.* and the limitation be to the personal, or legal personal, representatives of *A.* unexplained by any thing in the will, *A's* executors or administrators would be entitled to it, not as representing *A.* or as part of his estate, or liable to his debts, but in their own rights as *personæ designatæ* by the law.(*g*) This legal construction and appointment only take place when testators have not manifested any intention in their wills to the contrary; for if it appear from the dispositions in the instrument, whether it be a deed or will, that those words were used in reference to other persons than executors or administrators, that intention will prevail. We shall consider,—

1. Where the executors or administrators as personal, or legal personal, representatives, are entitled.

In *Evans* v. *Charles*, under a bequest to the personal representatives of a person then dead, the Court of Exchequer, at the head of which was *Eyre*, Ch. B. gave the property to the administratrix. The case seems to have been maturely considered, and must be held in great credit from his Lordship's acknowledged learning and talents. In *Long* v. *Blackall*,(*h*) Lord *Rosslyn* approved of it, observing that the words were to be explained according to the subject matter.

(*d*) 12 Ves. 433.
(*e*) 1 Mad. 36.
(*f*) 5 Ves. 402. *Price* v. *Strange*, 6 Mad. 159.
(*g*) See 2 Mad. 155.
(*h*) 3 Ves. 486.

In the case just noticed of *Evans* v. *Charles*,(*i*) it appears that *Alice Heath*, as executrix and residuary legatee of her brother *John*, became a creditor of *Charles Floyer*, who after *John's* death compounded with *Alice* and the other creditors for ten shillings in the pound in full of their demands. *Alice* died before receipt of the composition, having by will bequeathed her residuary estate among some of her relations, and appointed two executors, who died before *Floyer*; and the plaintiff, Mrs. *Evans*, was the legal personal representative of the surviving executor, as also of *Alice Heath*. *Floyer* being dead, his widow, *Blanch*, after the death of *Alice*, charged her property by will with the remaining ten shillings in the pound of her husband's debts which had been compounded for, directing the money to be paid to those creditors, "or their personal representatives." Of the share of this bequest coming to *Alice Heath* there were four sets of claimants: 1, the plaintiff *Evans*, as her administratratrix; 2, her residuary legatees; 3, her next of kin at her death, or their representatives; and, 4, her next of kin living at the death of *Blanch Floyer*. The Court disposed of these claims as follows:—First, that the plaintiff, as administratrix of *Alice*, was legally and beneficially entitled, unless any other person could show a better right. Secondly, that *Alice's* residuary legatees failed in doing so, because the fund was neither *Alice's* at the date of her will, nor at her death; so, it never constituting part of her estate, could not have passed as such, if it had been expressly bequeathed to them, for want of interest in *Alice*; consequently since her residury legatees could not have taken the money by direct bequest, much less could they do so upon the basis of an *implied* trust affecting the conscience of the plaintiff. And, thirdly and fourthly, that neither class of next of kin could make out a good title against the plaintiff, as that could only be effected by converting her into a trustee for them; a conversion impracticable in the present case; because the money formed no part of *Alice's* estate *at her death*; for in order to raise such a trust there must be property belonging to a testator at the time of his decease; but in this instance, there was no such property belonging to *Alice* at her death upon which to found a constructive trust for her next of kin. It followed, therefore, and was determined, that the plaintiff, the *legal representative* of *Alice*, was the only person who could make a title to the legacy.

The last case is an express decision, that where executors or administrators are entitled under a bequest "to the personal representatives" of a third person, they take the property by the description as *personæ designatæ*, beneficially, and not as part of the estate of the testator.

And it must be remarked, that the *subject matter* in the preceding case was one among many sums of money bequeathed by *Blanch Floyer* to satisfy in full debts of her late husband, which had been compounded. The motive for the bequest therefore afforded no inference that *Blanch*, in using the words "personal representatives" of those creditors, meant any other than those answering the *legal* decription, *viz.* their executors or administrators. There was, therefore, no ground upon which the Court of Exchequer could transfer

(*i*) Anstr. 128.

the legal right of Mrs. *Evans* to any other person; and it would seem that Lord *Rosslyn* referred to this circumstance, when he observed, that the words "personal representatives" were to be explained according to the subject matter; upon the strength of which he reconciled the present case with that of *Bridge* v. *Abbot*, after stated.

The construction which entitles executors or administrators merely because they answer the description of "personal representatives" in a *legal* sense, is discountenanced, as seldom, if ever, according with the intention of the testators. It is, therefore, only adopted from necessity, which appears from the case of *Evans* v. *Charles*, last stated; consequently, a court of equity will lay hold of any circumstances to displace the legal title, and give the property to the *next of kin* of the person described, upon the principle that the intention of a testator is more likely to be executed in imputing his sense of "personal representatives" to be descriptive of next of kin, than of mere executors or administrators. We shall therefore proceed to consider,—

2. When next of kin, and not executors or administrators, will be entitled under the description of "personal representatives," or "legal personal representatives.

It is settled, that if an inference can be drawn from a will that a testator used the words "personal, or legal personal, representatives" to designate individuals answering the description, though not in the legal sense of the terms, those persons will be entitled in preference to executors or administrators.

Thus in *Bridge* v. *Abbot*,(*k*) *Mary King* bequeathed the residue of her estate to several persons equally; but if any of them died before her, she directed that the share or shares of him, her or them so dying should belong to his, her or their "legal representatives," and appointed *Abbott* and *Webb* executors. One of the questions was, who were entitled to the share of *John Webb*, a residuary legatee that died before the testatrix, the claimants being the executors, the residuary legatees, and the next of kin of *John Webb*? And Lord *Alvanley* determined in favour of the next kin of *John*, living at the death of the testatrix.

In order to reconcile that decision with the case of *Evans* v. *Charles*, before stated, it must be ascribed to some such impression as the following: that the testatrix being anxious to prevent a lapse by the death of any of her residuary legatees before herself, and that the legacies should at all events go to their respective *families*, could not mean by the term "personal representatives," executors or administrators of legatees so happening to die, persons casually representing them, but their next of kin under the Statute of Distributions. The Court of Exchequer, in the subsequent case of *Evans* v. *Charles*, (in which the present was maturely considered) did not dispute the correctness of his Lordship's decision, but attributed it to his conviction (for the above reason as is presumed) that the testatrix intended by the words "personal representatives," the individuals answering that description under the statute, (that is) per-

(*k*) 3 Bro. C. C. 224. approved by Lord *Rosslyn* in *Long* v. *Blackall*, 3 Ves. 486.

sons *substituted* in the place of others deceased; a construction that could not be resorted to in *Evans* v. *Charles*, since the next of kin were *collaterals*, and not claiming by substitution or representation. In *Holloway* v. *Holloway*,(*l*) Lord *Alvanley* adverted to those two cases, both of which he considered to have been properly determined; observing on the same occasion, that the words "personal representatives," must have their *legal* meaning, (which is executors or administrators) unless *clearly* intended otherwise.

The following case differs from the last two authorities, in expressly referring to the Statute of Distributions, by adding to the words "personal representatives," the words "according to the *course* of *administration*," thereby pointing to the individuals entitled under that statute, to have the fund divided among them in the event of intestacy; a description, which it is presumed, would have been sufficient to explain the words "personal representatives" to mean next of kin,(*m*) had not the Court determined in their favour upon other circumstances of intention appearing in the will.

The case alluded to, is *Jennings* v. *Gallimore*,(*n*) in which the testator, *Ambrose Gallimore*, was empowered by settlement, in events which happened, to appoint 1000*l.* by deed or will; accordingly by his will, after reciting his power, he directed his trustees to pay the money "to his legal representatives according to the course of administration," in case his daughter *Dorothy Turner* should die without issue, a contingency which took place. *Ambrose* appointed two executors, one of whom was his nephew *William*, who was also his sole residuary legatee. *William* became a bankrupt, and his assignees claimed the money, or part of it, contending that the words "legal representatives" were to be construed executors of *Ambrose*. But Lord *Alvanley* was of opinion, that the next of kin were entitled upon the principle that *Ambrose*, if he had not intended by the expression "legal representatives" other persons than his executors, would never have shown so much anxiety to execute his power, and dispose of the 1000*l.* to persons by a description different from that by which he bequeathed his own property; for it was to be supposed, that as the testator had given his own estate to his executor *William*, *nominatim*, he would have appointed to him the 1000*l.* by the same name, if *William* had been intended to take that sum.

It must be noticed, that Lord *Alvanley* gave an extra-judicial opinion, that if the question had arisen upon the settlement (as might have happened if *Ambrose* had died intestate, without executing his power, since by the deed the money was limited "to his legal representatives, according to the course of administration,") *Ambrose's* administrator would have been entitled in preference to his next of kin. But his Lordship entertaining a doubt of that opinion, desired to be understood as not judicially putting any construction upon the deed. It cannot, however, be denied, that he thought these words were to receive different constructions when contained in a deed, and when in a will. No reason is given for such a difference; and it is presumed, that where the intention of parties to a deed is clear upon the face of it, courts of law and equity will carry it into effect, where there is no want of expres-

(*l*) 5 Ves. 402. (*m*) 19 Ves. 404. (*n*) 3 Ves. 146.

sions;(*o*) and a court of equity will even correct the instrument, if necessary, to give effect to such intention.(*p*) If then the words "personal representatives in the course of administration," be sufficient in a will (as before supposed) to designate relations described in the Statute of Distributions, there seems no reason why the same words appearing in a settlement, should not receive the like construction.

Before proceeding to the consideration of the next authority, it seems expedient to remark the difference when the bequest is to the personal representatives of a stranger, and when to those of the testator himself, as in the foregoing case. In the first instance, we have seen that the persons taking under the description, do so not only as *personæ designatæ*, but also that they take the property in their own rights, discharged from the debts, &c. of their testator. In the second, however, it is otherwise, for since the subject bequeathed is the personal estate of the testator, to whose own personal representatives he *ultimately* limits it, it follows that although the persons entitled under the description, whether they be executors, administrators, or next of kin, may succeed to the property as *personæ designatæ*, they nevertheless hold it subject to all the equities which it was liable to in consequence of belonging to the individual bequeathing it. After these observations, we shall proceed to the next instance, where the title of the next of kin was preferred to that of an executrix.

In *Long* v. *Blackall*,(*q*) the testator bequeathed leasehold estates to his widow *durante viduitate*, remainder to his sons in succession, including a child *en ventre sa mere*, if a son, for life, remainder to their respective issue male, or descendants from issue male. And if all his sons died without *leaving* issue male or descendants from such issue, remainder upon the death of the last surviving son "to such persons as should *then* be the *legal representatives*" of the testator; and he appointed his wife *sole executrix*. As the will originally stood, the ultimate limitation was in trust for the *executors* and *administrators* of his son *Thomas*, who was the first son named in the will; but those words had been erased with a pen, and the expressions, "such persons as shall *then* be my legal representatives," were interlined. It was one of the questions whether the widow, as *executrix*, or the testator's next of kin were entitled to the leaseholds? And Lord *Rosslyn* determined in favour of the latter.

It is very improbable that the testator intended his wife to take under the limitation to his legal representatives, merely on account of her being executrix, because having named her in the commencement of his will, it might have been expected that he would have bequeathed to her the property, by the description of wife or of executrix, had he meant that she should succeed to it. And it is also observable, that the testator had appointed a period, that might have been very distant, for his legal representatives to take the property, viz. upon the death of his sons, without leaving issue male, or descendants from such issue. Whoever *then* answered the de-

(*o*) Touchst. 86. *et seq.* 4 Maule & Selw. 433. 1 Ves. sen. 196. 18 Ves. 49.
(*p*) 1 Ball & Beat. 253. 256. 260. (*q*) 3 Ves. 486.

scription of his legal representatives, were to have the estates. He could not therefore mean his executrix by these words, a person who, upon every reasonable calculation, might be supposed to be long previously dead. The latter was the ground upon which the Court founded its decree in favour of the next of kin.

The last case seems to be an authority for considering that an executor or administrator will be excluded from taking beneficially, under the description of legal representative, personal estate ultimately limited by the testator to his legal representatives living at the failure of several prior dispositions of it; and upon the inference arising from the distance of time which may elapse before the event happens, that the testator meant by those words, other persons than his executor or administrator strictly answering the legal description.

We have seen that the apparent intention of the testator has led to the construction of the words "personal" or "legal personal representatives," in favour of the next of kin in preference to the executors or administrators. We proceed to observe,—

3. That a similar reason has induced the Court of Chancery to construe the same words to mean, children, grand-children, &c. to the exclusion of those persons who technically answer the description of "personal representatives."

An instance of this kind occurred in the case of *Horsepool* v. *Watson*,(*r*) in which a fund was ordered to be distributed after the death of the survivor of two parents "among all their *issue*, child or children, male or female, and *their representatives*" equally. Lord *Rosslyn*, after deciding that "issue" was explained by the words "child or children," declared that the expression "representatives" was also explained by the term "issue," to mean children, and descendants of *deceased* children; his Lordship reading the will in this manner; "among all the issue, child and children, male or female, and their representatives *being issue*," a word, as we have seen, comprehending *ex vi termini* descendants, however remote, from the persons described.(*s*) He therefore decreed in favour of the issue of a deceased child in preference to its administrator.

4. As to the title of a husband or wife under a limitation to the personal" or "legal personal representatives" of each other.

It has been shown in the fifth and sixth sections that neither husband nor wife regularly answers the description which would entitle either of them to take under a bequest to the relations, or to the next of kin of the other; but in order to include them in such limitations it must appear from the instruments, that they were in the contemplation of the settlors or testators, and intended by the description as *personæ designatæ*. In the present case, however, it is presumed, there is this difference, that if either be clothed with the character of executor or administrator of the other, the *primâ facie legal* title attaches to the office, which will prevail unless an intention to the contrary be expressed or clearly apparent in the instrument,(*t*) and then if the words "personal representatives" be considered synonimous with "next of kin," the husband or wife must be excluded, since neither of them, as before shown, answers that de-

(*r*) 3 Ves. 383. and before stated, p. 90. (*s*) See sect. 4.
(*t*) See 14 Ves. 382. 18 Ves. 49. 3 Ves. 231-244. 1 Ves. sen. 84. 3 Atk. 758.

scription. But as this subject is discussed in the treatise of "the law of property arising from the relation of husband and wife,"(*u*) the reader is requested to refer to it.

The subject next in order is:

Sect. VIII. The construction of bequests when limited to "Executors and Administrators."

If personal estate be given to *B.* his "executors and administrators," the law and the testator's intention concur in transferring to *B.* the absolute interest in the legacy,(*x*) so that if *B.* die before the testator the bequest will lapse, and cannot be claimed by the executors or administrators of *B.* as will be shown in the eighth chapter which treats of lapsed legacies. And if an interest for *life* were given to *B.* with the ultimate limitation, after prior dispositions, or subject to his appointment, to the executors and administrators of *B.* it seems that the absolute interest would vest in him if he survived the testator, and his executors or administrators could not claim beneficially by virtue of the express limitation to them; the intention being that they should take the property to be distributed as part of *B's.* estate, with which the law agrees, such a limitation of personalty being analogous to a limitation of real property to the right heirs of a devisor.(*y*) But if no interest were given to *B.* and the bequest were to his executors and administrators, it should seem that the individuals answering the description would be *beneficially* entitled, as *personæ designatæ*, in analogy to the devise of real estate to the heir of *B.* without a previous limitation to *B.* whose heir would take by purchase in his own right, and not by force of the word "heir" considered as a term of limitation.(*z*) *A fortiori* the construction must be the same when a testator, in addition to the gift to the executors and administrators, declares it to be "for their own use and benefit." Accordingly in *Sanders* v. *Franks*,(*a*) it was determined by Sir *Thomas Plumer*, that a limitation of personal estate to a widow, by her husband's will, for *life*, with a power of appointment, and in default of such disposition "to her executors or administrators for their own use and benefit," did not vest the absolute interest in the property in the widow; but that she had an estate for *life* only, with a power to dispose of the fund, upon the principle, that the executors and administrators took as purchasers, in their own rights, and not by representation.

It was noticed in fifth and sixth sections, that neither husband nor wife is regularly entitled under a bequest to the relations or next of kin of the other; but it would seem that if the ultimate limitation of personal property be made to the executors or administrators" of either of them, then if the husband or wife be invested with either of those characters, he or she will be entitled to the bequest, as answering the description in the instrument.(*b*)

Sect. IX. Legacies to "Descendants."

Attempts have been made to induce the Court of Chancery to put the same construction upon the word "descendants" as upon the

(*u*) 1 vol. 326. 2 vol. 64–66.
(*x*) 15 Ves. 537. 2 Mad. 155.
(*y*) 15 Ves. 537.
(*z*) 2 Madd. 155.
(*a*) Ibid, 147. and see "Law of Husband and Wife," 2 vol. 215, &c.
(*b*) 15 Ves. 537.

term "relations," but the Court has constantly refused the application, since the principle which applies to the latter case does not apply to the former; for when a bequest is made to "relations" unless the Court were guided by the Statute of Distributions in ascertaining the legatees, the disposition would be void from the generality and uncertainty of the term; but when the word "descendants" is used, there is no necessity for resorting to the statute to fix or limit the objects of the bequest, as the natural import of the term is sufficient to include every individual proceeding from the *stock* or *family* referred to by the testator; so that a legacy "to the descendants of *B.*" will comprehend all his children, grand-children, &c.

Thus in *Crossly* v. *Clare*,(*c*) Mr. *Ince* devised his real estate to three persons for their lives, and the life of the survivor of them, with remainder "to the descendants of *Francis Ince*, now living in and about *Seven Oaks* in *Kent*, or thereafter living any where else, to be sold, and the money to be *equally* divided amongst them." He then gave 4000*l.* "to the descendants" of *Francis Ince*, in the same words. Kindred in the second and third degrees were the claimants, as also one in the fourth degree, who was born after the date of the will. But Sir *Thomas Clarke*. M. R. decided against the latter, because not *in esse* when the will was made; and he determined that great grand-children were entitled with the grand-children to shares of the fund, since they answered the description of descendants of *Francis Ince*, and the distribution must have been *per capita*.(*d*)

So also in *Butler* v. *Stratton*,(*e*) Mrs. *Stratton* devised her residuary real and personal estates to trustees, in trust to sell the former, and divide the proceeds with his personal property "*equally* between the descendants of *Thomas Fairbank*, deceased." When the testatrix died, *Thomas Fairbank* had three sons and eleven grand-children; and Lord *Thurlow* determined that all *Fairbank's* descendants, as well grand-children as children, were entitled to the fund and *per capita*.

We shall next proceed to consider,—

SECT. X. What persons may claim under the word "FAMILY."

The word "family," when applied to personal property, is synonimous with "kindred" or "relations." If it be asked, of what family is *A.*? the question will be answered in being informed from what person he is descended; and whoever is related by blood to that stock, is related to and of the family of *A.*(*f*) This being the ordinary acceptation of the word "family," it may nevertheless be confined to particular relations by the context of wills, or the term may be enlarged by it, so that the expression may in some cases mean children, or next of kin, and in others may even include relations by marriage. In discussing this subject, the first consideration will be that class of cases—

1. Where the bequest is immediate and absolute.

If a legacy be given to or for the benefit of "*A.'s* family," the word "family" may be so explained by the context of the will, as to

(*c*) Ambl. 397. and see *Pierson* v. *Garnet*, 2 Bro. C. C. 38. 230. *S. P.*
(*d*) 3 Bro. C.C. 369. (*e*) 3 Bro. C. C. 367. (*f*) 9 Ves. 323.

be construed to mean the *children* of *A.* and *A.* will take no interest in the fund.

Accordingly, in *Barnes* v. *Patch*,(*g*) the testator *Jefferson*, after declaring his intention to provide for his children, devised his residuary estate equally between his two natural children *Thomas* and *Arabella*, to be paid at their ages of twenty-one, with benefit of survivorship, but if both died before that period, (which event happened,) he gave "the remainder of his estate to be *equally* divided between his brother *Lancelot's* and his sister *Esther's* families." *Lancelot* was living, and had eight children at the testator's death. *Esther* died before the testator, leaving ten children; and it was decided by Sir *W. Grant*, M. R. that by the word "family," children were intended, and that the distribution was to be made *per capita*, a construction which excluded *Lancelot*.

So also in *M'Leroth* v. *Bacon*,(*h*) Lord *Alvanley* said, that where a legacy is given to trustees for a married woman and her "family," the construction of such a bequest, without other circumstances, would be, that it should be applied for her and her *children*.

And if the word "family" be used in devising freehold estates, as to *A.* for life, with remainder to his family, it seems that *A.'s* heir at law will be entitled under that description.(*i*)

It is not so clear when the fund is a mixed one, consisting of real and personal estates, and the limitation is to the "family" of *J. S.* or *J. S.* for life, remainder to his "family;" or, after several dispositions, the ultimate limitation is "to the family of the devisor," whether the heir will take the whole fund or only the real estate, and the next of kin the personalty. Lord *Eldon*, in *Wright* v. *Atkyns*,(*k*) appears to have intimated an opinion, that since it had been decided at law, that under the word "relations,"(*l*) next of kin should take freehold estate; and since the heir had been held by law to be entitled to the land under the word "family," it was only fair that the heir should be at liberty to take the personal fund, under a limitation of both real and personal estate, to the "family" of *A.*

The only decision upon this point appears to be the short note mentioned below, and referred to in *Wright* v. *Atkyns*.

Regularly, the person designated by law to take real property upon intestacy, is the heir; and the persons to take personal estate are next of kin. Hence, it seems a consequence, when real and personal property are devised together in such a manner, as to render it uncertain who are the individuals intended by the description adopted, that the law will give the freehold estate to the heir, and the personal to the next of kin. Such appears to have been the opinion of the Master of the Rolls from the following short note: "1732, under a limitation to the *family* of *J. S.* the real estates descend to the heir at law; the personal estate goes to the next of kin."(*m*) Also, in the same case of *Wright* v. *Atkyns*,(*n*) Sir *W. Grant* observed, that the word "family," when applied to personalty, could

(*g*) 8 Ves. 604--607. (*h*) 5 Ves. 166.
(*i*) *Chapman's* case, Dy. 333. *Counden* v. *Clerke*, Hob. 33. *Wright* v. *Atkyns*, Coop. 122. *Doe* v. *Smith*, 5 Maule & Selw. 126.
(*k*) Coop. 123. (*l*) *Supra*, sect. 5. p. 92.
(*m*) 1 Taunt. 266. 17 Ves. 263. (*n*) 17 Ves. 263.

not be contended to mean the heir at law. This, with the general rule, would, as is presumed, have afforded sufficient authority for an opinion, that a devise of real and personal estate to *A.* for life, remainder to his "family," would have entitled the heir to the land, and the next of kin to the personal property, if Lord *Eldon* had not thought it reasonable, that since courts of law permitted the next of kin to take freehold estate by the term "relations," a court of equity should allow the heir to take the personal under the word "family," when the disposition was of both funds. The conclusion, however, seems liable to these observations; that unless the courts of law had construed the word "relations" to mean next of kin, there would have been an intestacy as to the land, from the uncertainty of who was meant by the expression "relations," and the heir would have taken by descent; a consequence which would not have followed if the word adopted had been "family;" for in such a case the law gives the real estate to the heir, either by purchase or limitation, according to the terms of the devise; and a court of equity distributes the personal property among the next of kin: there is, therefore, no necessity to alter the ordinary legal and equitable constructions before mentioned, for the purpose of preventing an intestacy, since the heir can take the freehold estate, and the next kin the personal, without any inconvenience, each class of representatives answering the description of the bequest. And there is no objection to using the word "family" in two different senses in the same will, when it is applied to different subjects; so that it may, consistently with the construction adopted in analogous cases, mean the heir when the subject is freehold estate; and also next of kin when referred to personal property.(*o*) Perhaps the right conclusion may be, that whether the devise of freehold and personal estates be made to *A.* for life, with remainder to his family, or to the devisor's family after the death of *A.* the heir will be entitled to the land, and the next of kin to the personal property.

This conclusion, however, can only be drawn when the will affords no intention contrary to the title of the next kin to the personality; for we have seen(*p*) that an heir may take personal estate under the word "heir," as *personæ designatæ.* If then the real and personal estates be so devised, that it appears to have been the testator's meaning, that both of them should go and be enjoyed *together,* it is presumed, in analogy to the case of *Gwynne* v. *Muddock,*(*q*) that as the heir is legally entitled to the freehold estate, he will also be entitled to the personal.

It appears from the foregoing observations, that when no intention appears that the word "family" was meant to designate any particular class of individuals, the next of kin of the person described will be entitled; a title depending upon the same principle which regulates a bequest to "relations" generally.(*r*)

Since then, the word "family" is a synonimic, with the term "relations," it follows that bequests to "family" are to be contrued by

(*o*) See Lord *Ellenborough's* observations in *Doe* v. *Smith,* 5 Maule & Selw. 131.
(*p*) *Ante,* sect. 3. p. 88.
(*q*) 14 Ves. 488. and see the sect. and page last referred to.
(*r*) See *ante,* sect. 5. p. 92. 9 Ves. 319.

the same rules that are to be applied to relations, not only as to the manner and proportions in which the family, *i. e.* next of kin, are to divide the property among them in compliance with the terms of the will, but also in regard to the particular persons in the class of next of kin, who are to be preferred to others of the same class, in consequence of the descriptions in the bequests: these subjects are minutely considered and detailed in the fifth section, treating of legacies to relations, to which the reader is referred.

It has been noticed, that a legacy to relations does not regularly include those by marriage;(*s*) and the principle of that exclusion equally applies when the bequest is to "family;" but a contrary intention of a testator appearing from his testament, will alter the construction.

Thus in the case of *M'Leroth* v. *Bacon*,(*t*) Mr. *Lloyd* bequeathed to *Martha*, youngest daughter of *W. Rolfe*, and wife of *M'Leroth*, 1000*l.* which he directed to be paid to her father *Rolfe*, for her benefit, to be settled by him to her separate use, and as a provision for herself, and for the benefit of her *children*, if *Rolfe* should think proper and so direct; or that the whole, or any part of it should be paid and applied "for the benefit of his said daughter and her *family*, but either immediately or in future, as *Rolfe* might think most useful and beneficial to *her* and her *family*, and as *Rolfe* should appoint;" the testator empowering him at discretion, to direct the *manner* in which the legacy should be applied for the benefit of *Martha* and "her family;" but if *Rolfe* died without having made such direction, the money was to be paid as *Martha* should appoint, "to be applied for the benefit of her and her *family*." *Rolfe* gave no effectual direction for the application of the money, and *Martha*, in exercise of the power, appointed by deed 800*l.* of the 1000*l.* to her *husband* absolutely, and the dividends of the residue she settled upon herself for life, remainder to her *husband* for life, with remainder as to the capital to her children, &c. To carry into effect that appointment, was the object of the suit by *Martha* and her husband; and the question was, whether the appointment to him was authorized by the power? Lord *Alvanley* was of opinion in the affirmative, upon construction of the whole will, which enabled *Rolfe*, had he done so, to advance any part, or the whole immediately, or *in any way* he thought, under all circumstances, *most beneficial* for *Martha* and *her family;* terms that would have authorized him to make an advancement for setting up the husband in trade. Such being the meaning and effect of the power given to *Rolfe*, his Honour conceived that his daughter *Martha* was intended to have similar authority and discretion, if her father omitted to exercise his own; so that under those circumstances, her appointment to her husband was valid, as being within the terms of the power explained by the context of the will.

With the last case we shall introduce the second class of authorities,(*viz*)—

2. Where the bequests were not immediate to the objects comprised in the word "family," but were connected with a power of appointment.

(*s*) *Ante*, p. 106. (*t*) 5 Ves. 159.

In treating upon the word "relations," it was shown that when a testator delegates to an individual a power to distribute a fund among such of his (the testator's) relations as he pleases, that person may, notwithstanding the Statute of Distributions, by which that term is in general construed, appoint to persons not comprehended within the Act; and that if he make no appointment, a court of equity will distribute the property among the testator's next of kin living at the death of the donee of the power.(*u*) It is presumed, that the same rule is equally applicable, where the property is so given to the testator's "family" and the word is to be construed synonimous to "relations."

If then a testator give his residuary personal estate to "such of his family as *A.* shall appoint," or to *A.* for life, and afterwards "to such of *A.'s* family as *A.* shall appoint," *A.* may appoint to relatives not within the Statute of Distributions; or if he die without executing his power, the Court of Chancery will divide the fund among the next of kin living at the death of *A.* To the cases referred to in note(*u*), that of *Cruwys* v. *Colman,*(*x*) may be added. There *Dorothy Cruwys* appointed her sister *Bridget,* sole executrix and residuary legatee; desiring that *Bridget* at her death, would bequeath "to those of *her own family,* what she had in her power to dispose of, that was the testatrix's." *Bridget* made no such disposition, and her nephew, who was her sole next of kin at her decease, claimed the whole residue in that character, in preference to the testatrix's next of kin living at her decease. Sir *W. Grant* decreed in favour of the nephew, as next of kin of *Bridget;* observing, that this was a trust for *her* next of kin, and so declared in the will; and not for the next of kin of the testatrix; but which made no difference is this case; for that "where a *power of selection* was given in favour of a testator's own relations, and that power was not exercised, the property undisposed of, would go to the next of kin, at the death of the party who had the power. Therefore, even if this had been a trust for the testatrix's "family," it would have been for such as were next of kin at *Bridget's* death; so either way the nephew was entitled to the whole of the property."

But if *A.'s* authority, instead of a power of selection, be confined merely to ascertaining the shares of such of the testator's "family" as could claim under the Statute of Distributions, and who would be the next of kin; then if no appointment be made, or if made, should it be void by the nomination of relations not within the Statute, the testator's next of kin living at his death, would alone be entitled to the property, as being the sole objects of the power.(*y*)

SECT. XI. Legacy to "NEPHEWS AND NIECES."

The reasoning in the cases stated in the eighth and ninth divisions of the second section of the present chapter, applies to bequests to nephews and nieces, and to which the reader is referred.

In the case of *Falkner* v. *Butler,*(*z*) the testator directed the residue of his personal estate to be invested in the names of trustees, in trust for his wife for life; and after her decease, the principal to be

(*u*) See *ante,* sect. 5, p. 97, and the cases.
(*x*) 9 Ves. 319, and see *Wright* v. *Atkyns,* Coop. 120.
(*y*) See *Pope* v. *Whitcombe,* 3 Meriv. 689, stated *supra,* p. 96. (*z*) Amb. 514.

paid among such of his relations, sisters, nephews, and nieces, as his wife should by will appoint. The wife surviving the testator, by will appointed 700*l.* part of the funds, to *George Olave*, the testator's nephew in law, in trust for *his children*. Sir *Thomas Sewell*, M. R. was clearly of opinion that the power of appointment was confined to nephews and nieces, and could not be extended to *great* nephews and nieces.

The recent case of *Shelley* v. *Bryer*,(*a*) is a stronger case to the same point; inasmuch as there was there strong ground to argue, that at least one of the testator's great nieces was intended.

In that case, the testator gave the produce of the sale of his residuary real and personal estate, after the death of his sister, *Susannah Shelley*, equally to be divided between his nephews and nieces who might then be living. By codicil, he gave to his infant *niece*, *Harriet Shelley*, whom he had not then seen, the sum of 500*l.* over and above her share, after the decease of his sister, in the body of his will treated of more at large.

Harriet Shelley, the infant legatee, was a *great niece* of the testator. At the time of the testator's death, he had several nephews, two great nephews, but no niece, nor any great niece, except the plaintiff. Previously to *Susannah Shelley's* death, several great nephews and great nieces were born. It was contended that the plaintiff, though a great niece, must be included as being specifically named in the will. The great nephews and great nieces contended, they were entitled to be included as nephews and nieces, the testator having shown his meaning in the use of the words nephews and nieces, by calling *Harry Shelley* his *niece*, she being in fact, his great niece. For the nephews it was contended, that the cases deciding that the word "children" did not comprehend "grand-children," governed the present, and that the implication contended for, could not be allowed to enlarge the express meaning of the words used; and that it was only a mistaken recital of a legacy. Sir *Thomas Plumer*, M. R. concurred in the argument for the nephews, though he confessed there was difficulty on both sides; but his Honour thought it was better to abide by the terms which were express, than to take upon himself by inference, to enlarge them, either to let in the plaintiff or the other great nephews and nieces.

Sect. XII. Legacies to "First and Second Cousins."

Lord *Kenyon*, M. R. determined in the case of *Mayott* v. *Mayott*,(*b*) that under a bequest to all the testator's first and second cousins of the name of *Mayott*, first cousins of that name once removed, living at the testator's death, were entitled with a first cousin of the same name. There appeared to be no person at the decease of the testator of the name of *Mayott*, who was strictly the second cousin.

Sect. XIII. Bequests to "Government."

A legacy to government for the benefit of the public, is to be disposed of under the King's appointment by sign manuel. The Crown is to direct its application to a proper use.

Accordingly in *Newland* v. *Attorney General*,(*c*) *Abraham Newland* bequeathed stock "to his Majesty's *government* in exoneration

(*a*) 1 Jacob, 207. (*b*) 2 Bro. C. C. 125. ed. by *Belt*. (*c*) 3 Meriv. 684.

of the national debt." Lord *Eldon* directed the fund to be transferred to such person as the King should appoint under sign manual.

SECT. XIV. Legacies to Servants.

1. In order to answer the description of servant so as to be included in a bequest "to servants," it seems essential that there should be a contract between the testator and the claimant, out of which the relation of master and servant could arise, and also such an engagement as would entitle the master to the service of the individual during the whole period, *i. e.* during each and every part of the time for which he contracted to serve. If, then, an individual were in the employ of a testator in consequence of an agreement between the testator and another person, and the servant was not only in the employ of the testator, but also of the person contracted with; or if from the nature of the engagement and service, the person employed could not be considered a servant in the usual acceptation of that word, he would not be entitled under a bequest to servants. The following cases will illustrate the above observations.

In *Chilcot* v. *Bromley*,(*d*) Mr. *Bromley*, after giving legacies to two of his servants, if in his service at his death, bequeathed to his "*other* servants" who should be living with him at that time, 50*l.* a piece, and 10*l.* each for mourning. He revoked the two latter legacies by a codicil, and gave "to all his *other* servants, in lieu thereof 500*l.* each, and 20*l.* each for mourning." Under this bequest, the plaintiff, a coachman, who was provided for the testator by a job-master, together with a carriage and horses in the usual course of business, claimed the legacies bequeathed to servants by the codicil, and evidence produced on both sides (which was contradictory) was admitted to prove and disprove the plaintiff being servant to the testator in the usual acceptation of the term. Sir *W. Grant* decided, that the plaintiff was not a servant within the intent and meaning of the will.

And in *Townsend* v. *Windham*,(*e*) the Duke of *Bolton* bequeathed a year's wages "to such of his servants as should be living with him at his death." The Court declared, that stewards of courts, and such other servants as were not obliged to pass their whole time in their master's service, were not servants within the meaning of the bequest; remarking at the same time, that it could not confine the terms of bequest to such servants only who lived at the testator's house, or had diet from him.

2. It is observable, that part of the description of the servant-legatees required their being in the service of the testator at the time of his death; a circumstance which, in general, must be complied with. Still a servant may be considered by a testator as continuing in his employment, and be intended to take under the bequest, although he quitted the testator's house previously to his death. The evidence admissible in such case is, that the person was in reality in the service of the testator at his death, so as to answer the description in the instrument; and to establish which fact, declarations of the testator upon the subject cannot be rejected; but testimony that the testator meant a servant, notwithstanding his having left the testator's service, to take a legacy bequeathed to servants only in his

(*d*) 12 Ves. 114. (*e*) 2 Vern. 546.

employment at his death, cannot be received, as it is in direct opposition to the will.(*f*)

All these points were discussed and settled in the case of *Herbert* v. *Reid*,(*g*) which was first determined by Sir *W. Grant*, and afterwards confirmed by Lord *Eldon* upon appeal. *Robert Bretcliff* bequeathed to the plaintiff, *Jane Herbert*, "if in his service at the time of his death," a specific legacy of 500*l. three per cent consols;* and he gave his residuary estate to his executors, *Reid* and *Rogers*. *Jane* quitted the testator's *house* a few days before his death; yet she claimed the legacy, upon the ground that although she had left the dwelling of the testator, she did not leave his *service*, but was *considered* by him as his servant up to the period of his decease. This was the fact established. *Reid* and *Rogers* (who were defendants) did not assert in their answers, that *Jane*, in leaving the testator's house, quitted his service, but confined their direct allegation to her leaving his dwelling. *Jane* produced three witnesses who proved declarations of the testator, that she was to return *home* again when he got better; and that he had left her 500*l.* by his will; also that the testator, in conversation with one of them upon the question whether he should leave *Jane's* legacy *weekly*, or as he had left it by his will, resolved, upon the advice of the witness, *not to alter his will*. The result of this testimony, if admissible, proved that *Jane*, although out of the testator's house, was still considered by him to be in his service, and a legatee in his will. Upon such testimony, Sir *W. Grant* determined that *Jane* was entitled to the legacy, a decision approved of and confirmed by Lord *Eldon;* and upon the following grounds:—1. That the evidence was admissible to prove that *Jane* was in the testator's service at his death; justice requiring the reception of it, since no person except the master and servant could furnish evidence upon that fact; and from necessity the master must explain *quo animo* he sent his servant from his house, *viz.* whether as putting an entire period to the relation between master and servant, or merely as suspending the performance of service: 2. That the evidence proved that *Jane's* departure from the house was only a suspension of her service: and lastly, that evidence would have been inadmissible to show the testator's intention that *Jane* should have the legacy, notwithstanding she might not be in his employ as a servant in his house at the time of his death.

Having now brought to a conclusion our review of the authorities fixing and establishing the construction of words referring to individuals in classes as to relations, &c. so far as relates to the persons answering those descriptions; it will be useful to collect the cases dispersed through the preceding sections in order to ascertain:

Sect. XV. The different periods of time at which persons answering the descriptions of family, relations, next of kin, personal representatives, issue, heirs, and descendants, (to whom bequests were made by those terms generally,

(*f*) 16 Ves. 486. 489. (*g*) Ibid. 481.

and without discrimination) were required to be *in esse*, for the purpose of participating in the legatory fund.

In the different classes of persons just enumerated, children are omitted, since the present subject, so far as it relates to them, has been minutely considered in the first section of this chapter; to which, therefore, the attention of the reader is directed. Most of the rules, constructions, and distinctions there laid down and taken, are equally applicable to bequests made to persons by the words before enumerated. We shall proceed, as in the first section to consider,

1. When next of kin, &c. living at the *date* of the will are solely and exclusively entitled.

If the will express, or clearly show that a testator, in bequeathing to the relations, next of kin, or descendants of a deceased individual, referred to such of them as were in existence when the will was made, they only will be entitled; as if the bequest was "I give 1000*l.* to the descendants of the late *A. B.* now living," those descendants only *in esse* at the date of the will can claim the legacy.(*h*)

2. But, in general, a will begins to speak at the death of the testator, and, consequently, in ordinary cases relations, next of kin, issue, descendants, &c. living at that period will alone divide the property bequeathed to them by those words.(*i*) Such is the general rule of construction when the legacy is immediate to relations, &c.(*k*)

That rule will not be altered, although the fund be given to one or more persons for *life*, previously to the limitation by the testator to his own relations, &c. If, then, he bequeath his residuary estate to his relations, or next of kin, after first limiting it to *B.* for life; next of kin living at the death of the testator, and not at the demise of *B.* will alone be entitled, and that construction will be adopted, although *B.* the tenant for life, may be one of the next of kin,(*l*) except a contrary intention appear from the will as after mentioned in this section.

So also, if a general power of appointment had been given to *B.* and in the event of his not making any, remainder to the next of kin to the testator *A.* those next of kin only living at the death of *A.* will be entitled.(*m*)

Or if the power had not been general, but *restricted*, to the ascertaining of the shares of persons to whom the bequest was made by the word relations, &c. the testator's next of kin *in esse* at his decease would be exclusively entitled, and not the persons only answering the description of his next of kin, living at the death of *B.*

(*h*) *Crossly* v. *Clare*, Ambl. 397. *ante*, p. 115. and see sect. 1. of this chapter, p. 45 to 52.

(*i*) *Vide* sect. 1. pl. 2. p. 48. to 52.

(*k*) *Bridge* v. *Abbot*, 3 Bro. C. C. 224. *ante*, p. 110. *Holloway* v. *Holloway*, 5 Ves. 399. *supra*, p. 85. *Vaux* v. *Henderson*, 1 Jac. & Wal. 388, note; *supra*, p. 85.

(*l*) *Rayner* v. *Mowbray*, 3 Bro. C. C. 235. *Masters* v. *Hooper*, 4 Bro. C. C. 207. *Doe* v. *Lawson*, 3 East, 278. *Harrington* v. *Harte*, 1 Cox. 131, and see the Master of the Rolls' observations in *Jones* v. *Colbeck*, 8 Ves. 38. See also *Bird* v. *Wood*, *supra*; p. 107.

(*m*) See the case last referred to.

Suppose then the bequest be to relations, in such shares and proportions as *B.* shall appoint. If *B.* make no appointment, the testator's next of kin *in esse* at his, (the testator's) decease, will be solely and exclusively entitled.(*n*)

To the general rule before stated, the intention of testators or necessity, may create exceptions, which we will consider under the following head:

3. When relations, next of kin, &c. living at the death of a stranger, or a tenant for life of the property, will be entitled to it in exclusion of the representatives of those next of kin, surviving the testator, but dying before the fund becomes distributable.(*o*)

If a testator express, or his intention otherwise appear from his will, that a bequest to his relations, &c. living at the death of a person, or upon the happening of any other event, should take the fund his next of kin only in existence at the period described, will be entitled, in exclusion of the representatives of such of them as happened to be then dead.

An instance of this kind occurred in the case of *Long* v. *Blackall*,(*p*) before in part stated, where the testator gave lease-hold property upon death of his last surviving son, without leaving issue male, &c. (to whom he had limited the estates,) "to such persons as should *then* be his, (the testator's) legal representatives." The event happened upon which its last limitation was to take place; and it was determined, that the testator's next of kin living at the death of the survivor of the sons, were entitled in exclusion of the personal representatives of persons, next of kin to the testator at his decease, who did not survive the son.

So if the testator delegate a power to a person to *select* and appoint to his relations, &c. his residuary estate, and the donee omit to execute the power, the next of kin of the testator living at the death of the donee, will be the only persons entitled to the property,(*q*) a necessary construction founded upon the circumstances of the case; for since the persons to take, are uncertain, while the donee of the power lives without executing it, in consequence of their being dependent upon his will and pleasure, no interest could vest in any of the testator's next of kin, prior to the execution of such power, or the death of the donee, a circumstance distinguishing the present case from that before mentioned, of the donee's power being *limited* to ascertaining the shares of the next of kin; for the next of kin in existence at the testator's death, took vested interests, liable only to be devested in regard to the proportions they were to take, if the donee should exercise his power.

Suppose, then, a legacy to be thus bequeathed: "to *such* of my relations or family, as my wife in her discretion shall think proper to appoint by will, &c." If the widow make no appointment, or an invalid one, the testator's next of kin living at *her* death, will be the *only* persons entitled to the fund.(*r*)

(*n*) *Pope* v. *Whitcombe*, 3 Meriv. 689. *ante*, p. 96.
(*o*) See sect. 1. of this chapter, p. 59 to 62.
(*p*) 3 Ves. 486. *ante*, p. 112. (*q*) See *ante*, sect. 5. p. 98.
(*r*) *Cruwys* v. *Colman*, 9 Ves. 325. *Harding* v. *Glyn*, 1 Atk. 469. *supra*, p. 100. *Cole* v. *Wade*, 15 Ves. 27. 43. *ante*, p. 99.

Or if such power be committed to more than one person, and it by any means become extinct during the lives of the donees, it should seem that as the testator's next of kin would take vested interests at *that period*, of the power becoming extinct, those *then* in existence would be the *only* persons who could make a title to the property.(*s*)

It has been noticed, that although property were bequeathed to one or more persons for life, prior to the ultimate limitation by the testator to his own relations, yet his next of kin living at his death, would be entitled. But since the intention of a testator, is the leading consideration in the construction of his will, if his meaning appear in the context, to refer to relations, &c. at that period, when the fund is distributable, *viz.* upon the happening of an event to occur *after* his decease, his next of kin in existence at that time, and not when he died, will be solely and exclusively entitled to the bequest.(*t*)

Accordingly, in *Jones* v. *Colbeck*,(*u*) *Thomas Dawson* bequeathed his residuary estate to trustees, to pay out of the interest an annuity of 20*l.* to his brother, *William Dawson*, for life, and the surplus interest for the support and education of the children of his (the testator's) daughter, *Mary Overton*, during the life of *William*, and after *William's* death, to pay the capital among such children equally, at twenty-one, with benefit of survivorship: but until *Mary* had a child or children, or if she survived them, or if she had none, the trustees were to pay to her (subject to the annuity) the interest for *life* to her separate use; and after the death of *Mary* and of her children under twenty-one, he gave the residue to be *distributed* "*among* his relations," in a due course of administration. *Mary* was the testator's *only* child, and sole next of kin living at his death; but had she been *then* dead, his next of kin would have been certain nephews and nieces (to whom he had given legacies by that description in his will,) and all of whom died *before Mary;* and she also died without issue, leaving great nephews and great nieces, children of the nephews and nieces before referred to, the only next of kin of the testator living at her *(Mary's)* death. The question was, what class of next kin was entitled? If the testator's next of kin at his decease, *Mary's* personal representatives would be entitled unless she were excluded by taking the *interest* of the whole for life, under the will, as contended by the representatives of the nephews and nieces, who would have been the sole next of kin, if *Mary* had not survived the testator. But if the testator's next of kin living at the death of *Mary* were only entitled, then his grand nephews and grand nieces were those persons; and in whose favour Sir *W. Grant* determined upon the apparent intention of the testator, to refer to relations not at his own death, but at that of *Mary Overton*. His Honour conceived that *Mary* could not possibly be meant by the terms "my relations," she being an *only* child, and the *distribution* of the fund directed to be made *among* relations; and that had she been intended, the testator would have given to her the residue in direct terms, and not by so strange and circuitous a phraseology.

(*s*) *Doyley* v. *Attorney General*, 4 Vin. Abr. 485. pl. 16.
(*t*) *Marsh* v. *Marsh*, 1 Bro. C. C. 293. ed. by Belt. (*u*) 8 Ves. 38.

The representatives of *Mary* being thus excluded, those of the nephews and nieces could not be more successful; for the testator supposed that *Mary* would, as she did, survive him, and he knew that she was his *nearest* relation: so that had he intended his nephews and nieces to be substituted in *Mary's* place, as *next* to her in relation to himself, he would not have used an expression which necessarily *included* her, but would have given *expressly* to the nephews and nieces, all of whom were previously mentioned as legatees by that description; and in addition to these remarks, the nephews and nieces did not answer the description of next of kin at the death of the testator, a character which was indispensable to their making a good title to the bequest. Under such circumstances, the Master of the Rolls was of opinion, that the testator meant his relations, *i. e.* his next of kin in existence at the death of *Mary;* an intention which entitled the grand nephews and grand nieces to the whole residue. His Honour remarking at the same time, that in the absence of such an intention referring to relations, at a period beyond the death of the testator, the case of *Holloway* v. *Holloway*,(*x*) was an authority that the mere gift of an interest for life to the daughter, would not have been sufficient to exclude her from taking the residue under the description, and in the character of sole next of kin of the testator living at his decease.

The next subject of our consideration will be—

Sect. XVI. When the fund given to Legatees, by the description of "family," "relations," "next of kin, &c." is to be divided among them either *per capita*, or *per stirpes*, or both *per stirpes et capita*.

Upon questions of this kind, the expressions in each will must be attended to; for according as the distribution is directed by the testator, so it must be made. We shall consider,—

1. Instances in which the legatees will take *per capita*.

When the bequest is to "relations," "family," &c. without mentioning the proportions in which the fund is to be divided, the Statute of Distributions(*y*) will regulate the number and *manner* in which the legatees (who are next of kin) are to take the property.

Suppose, then, a legacy to be given to the testator's relations generally. If his next of kin be related to him in equal degree, as brothers, there being no children of a deceased brother, the brothers will divide the fund among them in *equal shares*, *i. e. per capita;* each being entitled in his own right to an equal share. So it would be if *all* the brothers had died before the testator, one leaving *two* children, another *three* children, &c. all the nephews and nieces would take equal shares *per capita* in their own rights, and not as representing their parents; because they are sole next of kin, and related to the testator in equal degree.(*z*)

But if the testator's next of kin happen not to be related to him in equal degree, as a brother, and the children of a deceased brother, so as that under the statute the children would take *per*

(*x*) 5 Ves. 399.

(*y*) 22 & 23 Car. II. chap. 10.

(*z*) *Walsh* v. *Walsh*, Pre. Cha. 54. and see 1 P. Will. 595. *Durant* v. *Prestwood*, 1 Atk. 454. *Davers* v. *Dewes*, 3 P. Will. 50. *Lloyd* v. *Teach*, 2 Ves. sen. 213. and Mascall's Intest. 73. in which a variety of cases is collected.

stirpes as representing their parent, *viz.* the share which he would have taken, had he been living; yet if the testator has shown an intention that his next of kin shall be entitled to his property in equal shares, *i. e. per capita*, the distribution by the statute will be superseded. This may occur when the bequest is to "relations," "next of kin," &c. to be *equally divided* among them; or by expressions of the like import.

If, then, the testator's next of kin be a brother, and three children of a deceased brother, and the bequest is to the testator's "relations," or to the relations of *B.* to be *equally divided* among them, each child will be entitled to an equal share with the brother, the distribution being to be made *per capita;* which would not have been so if the testator had died intestate; for in that event the property must have been divided into *two* parts, and the children would have taken, by representation, their father's share *per stirpes.*(*a*)

It has been noticed, that when the terms of the bequest are so general in regard to the objects, as to occasion a virtual intestacy, it becomes necessary to resort to the Statute of Distributions. In these instances, the interests which the next of kin take under the act, are in common. The statute creates the tenancy in common, and to convert that interest into a joint tenancy, there must be express declaration in the will: a mere bequest to "relations," &c. will not be sufficient for the purpose. But this is reversed when the legacy is to "descendants" or "issue;" for we have seen that dispositions in those terms are not regulated by the statute.(*b*) The persons, therefore, entitled under those words, claim altogether by the will, which must be interpreted in the usual manner. Hence, if the bequest be to "descendants" or to "issue" generally, the individuals answering the description will take as joint tenants,(*c*) but if words of severance be added, or the bequest be to descendants or issue, to be *equally divided* among them, they will be entitled as tenants in common, and take equal shares *per capita.*

Suppose, then, a bequest of money to "descendants" or "issue" of the testator, or of a deceased person, to be *equally divided* among them; and that at the death of the testator, there were children, and issue of some of them; also issue of deceased children, and great-grand-children, whose parents were dead; the fund would be divisible among *all* of them *per capita* in equal shares, the grand-children, whose parents were living, not being excluded;(*d*) for every one of them answers the description in the will, and each is capable of showing a title in his own right.

The construction will be the same, if the legatees be described under the word "family," as Sir *W. Grant* determined in the case of *Barnes* v. *Patch*(*e*) before stated.(*f*)

It is indifferent with respect to the application of this rule of interpretation, although the instrument containing the limitation be a *deed.* Accordingly in *Leigh* v. *Norbury*,(*g*) Mr. *Worthington* vested in

(*a*) *Thomas* v. *Hole*, Forrest, 251. stated *supra*, p. 92. and see 1 Bro. C. C. 33.
(*b*) See sect. 4. p. 88, sect. IX. p. 114.
(*c*) *Davenport* v. *Hanbury*, 3 Ves. 259. *supra*, p. 88.
(*d*) *Freeman* v. *Parsley*, 3 Ves. 421. stated *supra*, p. 88. *Crossly* v. *Clare*, Ambl. 397. *ante* p. 115. *Pierson* v *Garnet*, 2 Bro. C. C. 38. 230.
(*e*) 8 Ves. 604. (*f*) Stated *supra*, p. 116. (*g*) 13 Ves. 340.

the trustees of his marriage settlement "all his personal property in trust for himself for life, and after his death to pay 100*l.* to his intended wife in lieu of dower and thirds, and then to apply the fund according to his appointment; but if he made none, in trust to dispose of the property unto and *equally* among the lawful "issue" of him (*Worthington*)." There was no issue of that marriage; but Mr. *Worthington* left five children by a former wife, and died without making any appointment. It also appeared that he left grand-children at his death, who claimed equal shares of the fund with the children. And Sir *W. Grant* declared the property to be divisible among all the children and grand-children, *per capita*.

The rule of construction we have been considering as applicable to bequests made to "issue," "descendants," and "family," equally holds when legacies are given to persons in existence, and the "children" of others who are dead; an instance of which occurred in the following case:

In *Butler* v. *Stratton*,(*h*) Mrs. *Stratton* devised freehold houses to trustees, to sell and divide the produce *equally* between *Robert Stratton*, *John Stratton*, and the "children" of *Mary Patterson*. *Mary* had three children living at the death of the testatrix; and the question was, whether they should take *per stirpes*? in which case the fund would be divisible into three parts, to one of which only the three children would be entitled; or, whether, they should take *per capita*? in which event, the property would be divisible into *five* parts, and each child entitled to an equal share with the *Strattons* in its own right. And Lord *Thurlow* determined that the distribution was to be made *per capita*.

So also in *Blackler* v. *Webb*,(*i*) Mr. *Bagwell*, having had several children, some of whom were dead leaving children, bequeathed his residuary personal estate *equally* to his son *James*, and to his son *Peter's* children, to his daughter *Traverse*, and to his daughter *Webb's* children, and to his daughter *Mann*. When the will was made, the testator's son *Peter* was dead, having left several children; the testator's daughter *Webb* was then living, and her husband being in needy circumstances, the testator made a provision for her in his will, which he settled to her separate use. Under these circumstances, the question was, whether the testator's children should take *per capita* or *per stirpes*? And it was determined by Lord *King*, that according to the true construction of the will, strengthened by the fact of the daughter *Webb's* children being unable to take by representation, as their mother was living, the fund was to be distributed among the children and grand-children *per capita*. We shall now consider,—

2. When the legatees take *per stirpes*.

In instances where, under a bequest to relations, &c. those persons only who are next of kin are entitled, and the Statute of Distributions is adopted, not only, to ascertain the persons to take, but also the proportions and manner in which the property is to be divided; the will being silent upon these subjects, if the next of kin of the person described be not related to him in equal degree, those

(*h*) 3 Bro. C. C. 367.
(*i*) 2 P. Will. 383. and see *Weld* v. *Bradbury*, 2 Vern. 705.

most remote can only claim *per stirpes; i. e.* in right of the persons who would have been entitled under the statute if they had been living. Hence it appears that the taking *per stirpes* always pre-supposes an inequality of relationship.

Suppose, then, a testator to bequeath a legacy to his "relations" or "next of kin," and that he left at his death two children, and three grand-children, the children of a deceased child; the grand-children would take their parent's share; *i. e.* one-third *per stirpes* under the statute, as representatives of their deceased parent.

Thus in *Stamp* v. *Cooke*,(*k*) the testator bequeathed his residuary estate to his wife for life, and after her death, his executors were to divide the same among his next relations, as sisters, nephews and nieces. The testator left at his death three sisters, a child of a deceased brother, and a child of a deceased sister; and one of the three sisters had two children living when the testator died, and who claimed shares in the fund, as answering the description of nephew and niece of the testator under the will. But Lord *Kenyon*, M. R. decided, first, that the testator's intention, that the residue should be divided otherwise than according to the statute, was not sufficiently clear, and therefore distribution should be made according to the act which excluded the two children of the living sister. And second, that by the statute the fund was divisible into five parts; three of which belonged to the three sisters, and the remaining share to the two children of the deceased brother and sister, *per stirpes*.

It is observable, in the last case, that there was nothing in the will, either as to the persons or the proportions in which they were to take, manifesting an intention in the testator to dispose of his property in a manner different from the statute; the Court, therefore, could not depart from the directions of the act, which declared that children of deceased brothers and sisters should take, *per stirpes*, the shares of their parents, where there were brothers and sisters in existence.

In considering the distribution *per capita*, it was noticed that a bequest to relations or next of kin equally, or to descendants or issue of individuals generally, entitled in the first case the children of deceased brothers and sisters to take *per capita* with surviving brothers and sisters; and that in the second case all descendants of the person described, *viz.* children, grand-children, &c. were also entitled *per capita*. But although the bequest direct an equal distribution, and notwithstanding the objects of bounty be described by the term "descendants," yet, if from other expressions in the will, it appears to have been the testator's intention that the descendants of deceased legatees should take by *representation*, i. e. *per stirpes*, such intention will prevail. An instance of this occurred in the following case:

In *Rowland* v. *Gorsuch*,(*l*) Dr. *Talbot* made the following disposition: "As to the residue of my fortune, I will and devise that the descendants of each of my first cousins deceased, partake in equal shares and proportions with my first cousins now alive." The question was between first cousins of the testator, and the descendants of first cousins who died before. And Lord *Kenyon* decided the fol-

(*k*) 1 Cox. 235. (*l*) 2 Cox, 187.

lowing points: first, that the term "descendants" was explained by the word "representatives," and therefore embraced such descendants only of the first cousins, who died before the testator, as were their next of kin at his decease; and secondly, that they took *per stirpes;* "for," said his Lordship, "if any person is under the necessity of making his claim as representative, he must take the share in the same manner as the person he represents."

The remaining subject for consideration under the present section is—

3. When legatees take both *per stirpes* and *per capita.*

Where a testator bequeaths personal estate to several persons as tenants in common, with a declaration that upon all or any of their deaths before a particular time, their respective shares shall be *equally* divided among the issue or descendants of each of them, and they die before the arrival of the period, some leaving children, others children and great grand-children, and others grand-children, and more remote descendants; in such case the issue of each deceased person will take their parent's shares *per stirpes;* and such issue, whether children only, or children and grand children, &c. will divide each parent's share among them equally *per capita.*

Suppose, then, a person to devise the money to arise from the sale of his real estate to his three sisters and his niece, if they were living, at the failure of issue male of his son (to whom he devised the estate in tail male;) but if they or any of them were then dead, their respective issue should be entitled to the shares of their parents in equal shares. Suppose also the three sisters to die before their brother, who left no issue male, and that one sister had children, the second sister children and great grand-children, and the third sister grand-children only; the distribution would be *per stirpes* and *per capita;* for the children of the first sister would take her share *per stirpes* and *per capita* among themselves. The children and great grand-children of the second sister would take her share *per stirpes* and *per capita* among themselves, the children and great grand-children being entitled to equal shares; and the grand-children of the third sister would take in the same manner as the children of the first. Such was the case of *Wythe* v. *Blackman* stated in a former page.(*m*) The principle seems to be the following: that the testator intended each parent a distinct share of his property if existing at the happening of the particular contingency; but if not, then that each of their shares should belong to their respective issue to whom it was given, as tenants in common; and the word "issue" comprehending all lineal descendants, entitled children, grand-children, &c. without distinction.

It was remarked, in considering bequests to children, that in general they must literally answer the description and character given of them by the will; and it was also shown that the rule admits of exception when the intention is clear that these children are not meant to be excluded, although in some particulars, they fail in answering the terms of the will. It is proposed now to consider:

(*m*) 1 Ves. sen. 196, *ante*, p. 70.

SECT. XVII. The effect of Mistakes in the *names* of Legatees generally.

1. When an error in, or the omission of, a name will be rectified by the *description* of the person, or the context of the will.

In *Stockdale* v. *Bushby*,(*n*) *Thomas Stockdale* bequeathed "to his namesake, *Thomas Stockdale*, the second son of his brother, *John Stockdale*," 1000*l.* when he attained twenty-one. *John* had no son of the name of *Thomas*, and his second son was called *William*, who claimed the legacy. And Sir *W. Grant* determined in his favour, upon the principle that the mistake in the name was obviated by the accurate description given of the person, viz. the second son of *John Stockdale*.

The last decision accords with authorities which establish that, where the name has been mistaken either in a will or deed, it will be corrected from the instrument, if the intention appear in the description of the legatee or donee, or in other parts of the will or deed.

Thus lands were given to the mayor and chamberlain of *Bartholomew's Hospital*, who were incorporated by a different name, the devise was held good; and *Weston*, J. observed, that if lands were devised to *A.* "eldest son of *B.*" although his name be *W.* yet the devise to him was good, because there was sufficient certainty;(*o*) a *dictum* established by the last stated case of *Stockdale* v. *Bushby*.

In conformity with this doctrine, we find Lord *Coke* stating in his Commentary upon *Littleton*,(*p*) that a wife is a good name of purchase without a christian name, and that so it is if a christian name be added and mistaken, as *Em* for *Emelyn*, &c. for *utile per inutile non vitiatur*. Also, that if lands be given to *Robert* Earl of *Pembroke*, where his name is *Henry*, or to *George* Bishop of *Norwich*, where his name is *John*, and so of an abbot; for in these and the like cases there can be but one of that dignity or name, and, therefore, such a grant is good, albeit the name of baptism be mistaken.

Also in *Pitcairne* v. *Brase*,(*q*) the devise was to *William Pitcairne*, the eldest son of *Charles Pitcairne*, of *Twickenham;* the name of the eldest son was *Andrew*, yet that was held a good devise, the error in name being rectified by the description of the person.

In the last case, although the second son had been named *William*, so that there would have been one person answering the name and another the description, still, if the context of the will afforded evidence that the error was merely in the name, it is presumed that the eldest son would have been entitled. Suppose then the estate to have been previously limited by the testator to several persons in succession for life, with remainder to their first, second, and other sons successively in tail, remainder to *Charles Pitcairne* for life, then to his *eldest* son *William* for life, remainder to his first and other sons in tail, remainder to *Andrew*, *second* son of *Charles* for life, remainder to his first and other sons in tail, with remainder to *J. A. third* son of *Charles*, for life, &c. Now although the name of

(*n*) 19 Ves. 381. Coop. 229, *S. C.* and see *Dowset* v. *Sweet*, Ambl. 175, stated *infra*. (*o*) 8 Leon, 18. (*p*) 3. a. (*q*) Finch's Rep. 403.

the second son be *William*, and the name of the eldest be *Andrew*, it is conceived that the eldest son would be entitled to the estate, since it plainly appears from the context of the will to have been the intention of the testator, that the sons of each tenant for life should succeed according to priority of birth; hence it is obvious, that his calling the eldest son of *Charles* by the name of *William*, was a mistake, which the contents of the will were sufficient to correct.

When a bequest is made to a class of individuals *nominatim*, and the name or christian name of one of them is omitted, and the name or christian name of another is repeated; if the context of the will show that the repetition of name was an error, and the name of the person omitted was intended to have been inserted, the mistake will be corrected.

An instance of this occurred in *Garth* v. *Meyrick*.(*r*) There a testator gave his residuary estate to his *six* grand-children, by their christian names. The name of *Ann* (one of them) was repeated, and that of *Elizabeth* (another of them) was omitted. The context of the will clearly showed the mistake which had occurred, and in consequence the Court rectified it, by admitting *Elizabeth* to an equal share in the bequest.

The same result will follow, if the name of one in the class of legatees be *totally omitted*, and the mistake appear from the context of the will.

Thus in *Humphreys* v. *Humphreys*,(*s*) the testator gave his residuary personal estate "to be divided equally among his *seven* children *A.*, *B.*, *C.*, *D.*, *E.* and *F.*" (naming only *six*.) He had *eight* children at the date of his will, but it appeared from it that he considered one of them as fully provided for by other means. And the Court decreed the *seven* other children to take the residue in equal shares; the intention of the testator to include his seven children being apparent by the will, which not only showed, but corrected the omission of the name of one of them.

Such is the rule of law applicable to mistakes in the names of legatees, when the ascertaining of the objects solely depends upon the context of the will; but in instances where such context is insufficient for the purpose, *parol* evidence will be admitted to prove the mistakes in the names or additions of the legatees, and to ascertain the person intended. Thus in the case before supposed, next after that of *Pitcairne* v. *Brase*, *Andrew* might prove that he was the person intended, and that the error was not in name, but description. The principle is this: that when it became necessary to apply the terms of the bequest to the object described, they were found not literally to apply; as part of the description referred to one person and the remainder to another. Hence a latent ambiguity, not apparent on the will, was raised from that circumstance in regard to the individual meant by the testator, which let in evidence to show that he was mistaken in the description, and to prove whom he intended for his legatee.(*t*) We shall therefore proceed,—

(*r*) 1 Bro. C. C. 30. (*s*) 2 Cox, 186.

(*t*) See *Doe* v. *Huthwaite*, 3 Barn. & Ald. 632–642. and the opinion of Lord *Kenyon* in *Thomas* v. *Thomas*, 6 Term Rep. 676. and *infra*, sect. 18. p. 140.

2. To produce instances where the errors in naming legatees have been rectified by the admission of parol evidence.

It has long been settled, that parol evidence is to be admitted to raise and remove *latent* ambiguities. An instance of a latent ambiguity has been just given. It arises from the description in the will being made impossible or uncertain in application from collateral circumstances; as where a bequest is made to a person by a wrong name, or by a christian and surname, the former of which is applicable to two persons, evidence may be given to prove the error in description, and who was meant by the testator by the mistaken designation. The will shows that the testator intended a benefit to some person whom he had erroneously or defectively described; an error or defect which is discovered in attempting to ascertain the object of his bounty, and *dehors* the will. Hence a presumption arises of the testator being mistaken in naming the legatee; and to rectify that error evidence is admissible.(*u*)

Thus in *Masters* v. *Masters*,(*x*) the testatrix gave 200*l.* to Mrs. *Sawyer*. There was no such person ever known to the testatrix; but it was alleged that she meant a "Mrs. *Swopper*." And the Court directed the Master to inquire whom the testatrix meant by "Mrs. *Sawyer*," and whether Mrs. *Swopper* was not intended; and if he found that she was that person, then she was to receive her legacy in proportion with the other legatees, the case being one of abatement.

So in *Beaumont* v. *Fell*,(*y*) *A.* bequeathed 500*l.* to *Catharine Earnley;* the person's name who claimed the legacy was *Gertrude Yardley*, and it was admitted that no person named *Catharine Earnley* set up any right to the legacy; but it appeared in evidence that the testator's voice when he made his will was very low, and hardly intelligible; that he usually called the presumed legatee *Gatty*, which the scrivener, who took instructions for drawing the will, might have easily mistaken for *Katy;* and that the scrivener, not having clearly understood who the legatee of 500*l.* was, or what was her name, the testator directed him to *J. S.* and his wife to inform him further upon the subject, who afterwards declared that *Gertrude Yardley* was the person intended. It was also in proof, that the testator had declared in his life-time, that he would do well for *Gertrude* by his will. And the *Master of the Rolls* decreed that the legacy to *Gertrude Yardley*, though by the description of *Catharine Earnley* was valid, observing, that "the name, and not the person, was mistaken; and that it was very material there was no such person as *Catharine Earnley* who claimed the legacy, which, with the proofs of the testator speaking in a very low voice when he made his will, and of his having usually called the plaintiff *Gatty* instead of *Gertrude*, and often declared he would do well for her, was sufficient to entitle her to the legacy."

If then, as we have seen, parol evidence be admissible to ascertain the legatee when he is described by a wrong christian and surname, it follows that such testimony is equally so, where his chris-

(*u*) 2 P. Will. 137. *River's* case, 1 Atk. 410. (*x*) 1 P. Will. 421--425.
(*y*) 2 P. Will. 140.

tian name only is mistaken, or to ascertain his identity when there are two persons in the family of the legatee of the same christian name. As if a legacy was given to *John Thomas*, son of *William Thomas*, of, &c.; and *William* had two sons named *John*, it is necessary and proper to ascertain by parol evidence which of the two persons was intended by the testator.(*z*) With respect to mistakes in the baptismal name of the legatee, an instance of such a mistake being rectified by similar species of testimony, occurred in the following case:

In *Smith* v. *Coney*,(*a*) the bequest was of 500*l.* to "the Rev. *Charles Smith* of *Stapleford Tawney*, in the county of Essex, clerk." The legacy was claimed by the Rev. *Richard Smith*, upon evidence that there was no person answering the description of the legatee, according to the will; and that he, *Richard*, was, at the date of it, incumbent of *Stapleford Tawney*, and well known to the testatrix, who had a great regard for him. His claim was resisted by the executor, who set up another person as the intended legatee that died before the testatrix. The suit was not instituted until many years after the death of the testatrix, and six years after the death of a lady who lived with her in great intimacy, and who, it was suggested, knew her intentions, an objection which was obviated by the consent of the parties. And upon Lord *Alvanley* expressing an opinion in favour of *Richard Smith*, the executor withdrew his opposition and the claimant obtained a decree.

So in *Dowset* v. *Sweet*,(*b*) 100*l.* was bequeathed to "*John* and *Benedict*, sons of *John Sweet*," who had two sons only, *James* and *Benedict*; and it being proved that the testator was accustomed to call *James* by the name of *Jacky*, he was declared to be entitled, and the court was of opinion that if the evidence had only raised the ambiguity resulting from the father having no son called *John*, the description in the will would have rectified the error in name.

Sect. XVIII. The effect of mistakes in the *descriptions* of Legatees, and the admission of *parol Evidence* in those cases.

1. It may be considered as a settled rule upon this subject, that where the description of a legatee is erroneous, the error not occasioned by any fraud practised upon the testator, and there is no doubt as to the person who was intended to be described, the mistake will not disappoint the bequest. Hence, if a legacy be given to a person by a correct name, but with a wrong description or addition, the mistaken description will not vitiate the bequest, but be rejected; for it is a maxim that *veritas nominis tollit errorem demonstrationis*.(*c*)

Thus in *Standen* v. *Standen*,(*d*) *Charles Millar* bequeathed 200*l.* to trustees, in trust, "to place *Charles Millar Standen* and *Caroline Eliz Standen*, legitimate son and daughter of *Charles Standen*, now residing with a company of players," apprentices, as the trustees should think fit. The testator then directed his real estate to be

(*z*) *Cheyney's* case, 5 Rep. 68. b.
(*a*) 6 Ves. 42. and see *Doe* v. *Danvers*, 7 East, 302-3. (*b*) Ambl. 175.
(*c*) Lord *Bacon's* max. reg. 25.
(*d*) 2 Ves. jun. 589. *Dare* v. *Geary*, cited Ambl. 375. *S. P.*

sold, and gave the money, with the residue of his personal estate, in trust for his wife for life, and after her death, as to one moiety for such person or persons as she should by deed or will appoint, and which she afterwards disposed of by will; and as to the other moiety, in trust for *Charles Millar Standen* and *Caroline Eliz Standen, legitimate* son and daughter of *Charles Standen*," equally, with survivorship between them, if either died before twenty-one or marriage, with a further limitation if both of them died before the arrival of either of those periods. It appeared that *Charles Millar Standen* and *Caroline Eliz Standen* were *illegitimate* children, and one of the questions was, whether they could take under the wrong description of legitimate children? It was contended for them, that an inaccurate description of a legatee would not destroy the effect of a legacy given to him *nominatim*, therefore they were entitled to the benefit of the 200*l.* and the moiety over which the widow had no power of appointment. And the Lord *Chancellor* was of the same opinion, and decreed accordingly.

Upon similar reasoning, Lord *Alvanley's* observations in *Kennell* v. *Abbott*,(*e*) appear to be founded. He said, that where a person was supposed to be a child of the testator, and from motives of love and affection to the child, conceiving it to be his own, he had given it a legacy, and it afterwards turned out that he was imposed upon, the child not being his own, his Honour was not disposed to determine that the provision for the child would totally fail; for circumstances of *personal affection* to the legatee might be blended with the gift, which might entitle the child, although he might not answer the character in which the legacy was given.

Lord *Alvanley* put another case, and said, he would not have it understood that if a testator, in consequence of supposed affectionate conduct of his wife, gave her a legacy as to his *chaste* wife, evidence of violation of her marriage vow could be given for the purpose of defeating the bequest, since that would open too wide a field.

And it was said in argument, in the case of *Brett* v. *Rigden*,(*f*) that if a bequest were made to the wife of *J. S.* and *J. S.* afterwards died, whose widow thereupon married *J. D.* and then the testator died, the wife of *J. D.* would be entitled to the legacy, although she was not the wife of *J. S.* at the time the will took effect, and therefore did not answer the description at that period.

In *Smith* v. *Campbell*,(*g*) the testator, being resident in *India*, bequeathed the residue of his property amongst his nearest surviving relations "in my native country *Ireland*." When the testator died, his brother and two sisters resided in *Ireland*, and other two sisters lived in *America*. The question was, whether, as the two latter sisters were not resident in *Ireland*, they were not excluded from participating in the bequest; but Sir *William Grant*, M. R. determined in their favour, upon the principle that the words "in my native country *Ireland*," did not make part of the description which the relations were intended to answer to entitle them under the bequest, but were merely descriptive of the place in which the testator *supposed* his relatives to reside, in which case it was immaterial whether the testator had or had not correctly described the place of

(*e*) 4 Ves. 808. (*f*) Plowd. 344. (*g*) 19 Ves. 400-405.

residence of those who were sufficiently ascertained by the denomination "nearest surviving relations."

In the cases last stated, the intentions of testators were presumed in favour of the legatees, although they did not literally answer the description annexed to the names; but

2. Wherever a legacy is given to a person under a particular description and character, which *he* himself has *falsely* assumed; or where a testator, induced by the false representations of third persons to regard the legatee in a relationship which claims his bounty, bequeaths him a legacy by a description according with such supposed relationship, and no other motive for such bounty can be supposed, the law will not, in either case, permit the legatee to avail himself of the description, and therefore he cannot demand his legacy. The following cases will explain this proposition:

In *Kennell* v. *Abbott*,(*h*) Mrs. *Hickman*, under a power contained in articles made between her and Mr. *Lovell*, prior to their supposed marriage, made the following testamentary appointment, "to my husband, the said *Edward Lovell*, the sum of 150*l*." Mr. *Lovell* at the time of this fraudulent marriage, was the husband of another woman, and upon a question whether he was entitled to the legacy, Lord *Alvanley*, M. R. determined in the negative, in consequence of the fraud practised upon the testatrix by Mr. *Lovell*, observing, that upon general principles it would be a violation of every rule which ought to prevail as to the intention of a deceased person, if he permitted a man, availing himself of the character of husband of the testatrix, which he falsely assumed, and to whom in that character a legacy was given, to take any part of the estate of the person whom he so grossly abused, and who must be taken to have acted upon the duty imposed upon her (the testatrix) in that her relative character.

The principle of the last case is to be found in the civil law, as appears from a passage in the *Digest* referred to by the Court; "*falsam causam legata non obesse verius est, quia ratio legandi legato non cohæret: sed plerumque doli exceptio locum habebit, si probetur alias legaturus non fuisse.*(*i*) The principle contained in this passage, ought (observed Lord *Alvanley*) to govern courts of justice, and which he considered to have been adopted in ex parte *Wallop*,(*k*) a case (said his Lordship) that took up so much time before the Lords Commissioners, upon an application for a writ *de ventre inspiciendo* against a woman, who had lived with Mr. *Fellowes*, and had made him believe she had been brought to bed of several children; which he was weak enough to suppose his own. It was not a question, whether they were his children; for if so, his Lordship did not apprehend the decree should have been such as it was. But there were no such children. She had shown him children as her's, which were not so; and he gave legacies to them, *as her* children *by him*. It was held, that they were not entitled. There two things were wanting. The testator was not merely deceived as to their being his children; but he was deceived as to the other ingredient of the character, in which he gave them the legacies; for they were not the children of that woman.

In the two cases last stated, the mistakes under which the testa-

(*h*) 4 Ves. 802. (*i*) Book xxxv. tit. I. C. 72. v. 6. (*k*) 4 Bro. C. C. 90.

tors laboured, originated in their being grossly deceived and imposed upon. The description and character of the legatees were of the essence of the bequests, and it was a reasonable presumption that if the testator had known the real situations of the legatees, they would not have been objects of their bounty. These authorities are quite consistent with the cases before mentioned, where the errors in description were determined not to vitiate the legacies, as not being essential, and on the presumption that personal affection might have been ingredients in the bequests, which would not have induced the testators to withhold their bounty, had they been acquainted with all the circumstances of each case, a presumption which could not rationally be made in either of the cases last stated.

3. The same principle which has established the admissibility of parol evidence to correct errors in naming legatees, authorizes its allowance to rectify mistakes in the description of them. This evidence may be required either partially, *i. e.* merely to raise a latent ambiguity, to be removed by the terms of the will; or it may be wholly necessary, viz. to raise the ambiguity, and then to show and rectify the mistake. An example of the first proposition may occur, where a testator having two children, *Mary* and *Ann*, the former married, and the latter single, gave a legacy "to his *three* grandchildren, the children of *Ann*." Proof of the different circumstances of the two daughters at the date of the will, would be admitted to raise the latent ambiguity from the discrepancy between the description and the objects, and then the will would be sufficient to show the mistake in naming *Ann* instead of *Mary*, and to authorize a correction of the error. An instance of the second proposition may happen, where a bequest is made by a person "to the children of his brother *Samuel*," when in truth the testator never had a brother of that name, but left several brothers, each of them having children. In this case, parol evidence is necessary and admissible, not only to raise the latent ambiguity before mentioned, but also to show the mistake in description and to rectify it, by demonstrating what class of children were intended by the testator, under the erroneous description of "children of his brother *Samuel*."

In support of these remarks, the following authorities are produced:

In *Bradwin* v. *Harpur*,(*l*) Mrs. *Jackson* bequeathed the interest of a sixth part of her residuary estate to her niece *Mary Bradwin* for life, and after her death a moiety of the capital "to the said *Mary Bradwin's grand-children*, the children of her daughter *Mary*" at their ages of twenty-one; and the remaining moiety she gave to *Ann*, the daughter of her said niece, *Mary Bradwin*. The niece *Mary* had two children; *Mary*, one of the plaintiffs, who was *never married*, and *Ann* who was married, but died before the testatrix, and previously to the date of the will, leaving two children, *William* and *Robert Barnes*, the other plaintiffs. After the death of the niece, the suit was instituted, praying that one moiety of the sixth part of the residue might be paid to the plaintiff *Mary*, and the other half to the two *Barnes's* upon their attaining twenty-one; on the

(*l*) Ambl. 374.

ground that the testatrix so intended, but by a mistake of names had given a moiety to the children of *Mary*, who was never married, and the other moiety to *Ann*, who was dead at the time of the will, leaving the children who were plaintiffs in that suit. It was in evidence that the testatrix was eighty years old when she made her will, and lived in *Derbyshire*, and that *Mary Bradwin*, the niece, and her family, lived at *St. Alban's* in *Hertfordshire*, and that the testatrix had never seen her niece's children or grand-children. And the *Master of the Rolls* was satisfied of the mistake, and the power of the Court to set it right by decreeing according to the intention; and after an objection for a want of parties had been removed, the property in dispute, being of small amount, and the plaintiff *Mary*, a pauper, his Honour decreed the money to be paid.

Mr. *Ambler* properly observed, in a note to the last case, that the former part of the description "grand-children and daughter" was of itself sufficient to correct the mistake; *i. e.* without further aid from external evidence, than to show the error discoverable from the application of the description to the objects.

So in *Parsons* v. *Parsons*,(*m*) the testator created a trust to pay an annuity to his brother *Edward Parsons* for life, and after his death to go equally among his children by his then present wife. At the date of the will, the testator had no brother living except *Samuel* Parsons, who had a wife and children, but four or five years before, he had a brother named *Edward* Parsons, though he and his wife were dead when the will was made, and other legacies were given by it to his children. The testator had been in the habit of calling his brother *Samuel*, by the name of *Edward* and *Ned*. The bill was filed by the children of *Samuel*, and upon these circumstances, which were proved and admitted, the only question was, whether the testator intended his brother *Samuel*, when he named his brother *Edward*. And the Lord *Chancellor*, under the above circumstances, decreed, without argument, an account according to the prayer of the bill.

Upon the principal of these two cases, a very modern authority seems to have been founded. In *Careless* v. *Careless*,(*n*) the testator gave 500*l.* "to *Robert* Careless his nephew, the son of *Joseph* Careless." The testator had two brothers called *John* and *Thomas* Careless, each of whom had a son named *Robert*, but he had no brother of the name of *Joseph*. His freehold estate he devised, if he left no child, to his brother *John*, and 2000*l.* stock to his (the testator's) wife for life; upon whose death the principal was to be divided into two parts, one of which was to be in trust for the children of his brother *Thomas*, and the other for the children of his late sister *Eliz Hemmings*. He then devised his copyhold and leasehold estates to his wife for life, remainder to his *nephew Robert* Careless in tail, remainder to his brother *John*, his heirs, &c.; declaring that if his nephew *Robert* died under twenty-one without leaving issue, the leasehold was absolutely to go to his brother *John* Careless. After these bequests, the testator gave his bond debts to his wife for life, and then to his nephew *Robert* Careless, "the son of *John* Careless," who claimed the legacy of 500*l.* in which he was

(*m*) 1 Ves. jun. 266. (*n*) 1 Meriv. 384.

opposed by *Robert*, the son of *Thomas*. The first named *Robert* founded his claim upon intimacy between him and the testator, and his being treated by the testator with the greatest affection; while the second named *Robert* lived at a distance from the testator, and was almost unknown to him. These facts were established in evidence; and Sir *W. Grant*, M. R. after declaring the admissibility of the evidence, determined in favour of *Robert* the son of *John*.

The observation of Mr. *Ambler* on the case of *Bradwin* v. *Harpur*, seems applicable to the last; for when the latent error in description was made apparent by the evidence of the state of the testator's family, the manner in which he disposed of his property, and particularly of his copyhold and leasehold estates, together with his bond debts, appears to afford sufficient evidence of intention that *Robert*, the son of *John*, was meant and that the description of him as the son of *Joseph*, a nonentity, was a mere slip of the pen.

In the last two cases the evidence of the state of the testator's family, when applied to the descriptions, was competent to raise a *latent* ambiguity in the wills, a circumstance necessary to be attended to; for if facts given in evidence, instead of raising an ambiguity, be consistent with the description in a will, and consequently raise no presumption of a mistake made by the testator in particularizing the legatee, *direct* evidence of his having committed such an error cannot be received; for if such were not the rule, the effect would be to revoke part of a written instrument by *parol*, a result forbidden by the Statute of Frauds.(*o*) An example will illustrate these remarks:

Suppose a legacy were given by *Richard Styles* "to his brother *Thomas Styles*, and to *John Styles*, *his brother's son;*" and the testator had other brothers, each of whom had a son named *John Styles*, one of whom claimed the legacy bequeathed to *John Styles* in the will, as the person intended by the testator, upon parol declarations to that effect, which he was able to substantiate. That evidence could not be received if founded upon proof of no other facts, than that the testator had other brothers besides *Thomas*, who had each a son named *John;* for such circumstances being quite consistent with the will, raise no ambiguity in it, and consequently no presumption of error in the description; so that the legal construction of the devise being in favour of *John*, the son of *Thomas Styles*, his title must prevail. Such in effect is the case of *Doe* v. *Westlake*.(*p*)

But supposing a latent ambiguity to be well raised,—

4. If neither the will, nor extrinsic evidence is sufficient to dispel the ambiguity arising from the attempt to apply the description of the legatee to the person intended by the testator, the legacy must fail, from the uncertainty of its object. Suppose, then, a legacy to be given to *Ann James*, of *B.* in the parish *C.* by the description of "grand-daughter" of the testator, when in fact *Ann* was his *great* grand-daughter, and neither of *B.* nor in the parish of *C.* but *Jane James*, though not answering in name, was the testator's grand-daughter, resident at *B.* in the parish of *C.;* now unless it were in proof that the testator mistook the name of *Ann* for that of *Jane*, or that he mistook the description of *Ann*, the bequest

(*o*) 29 Char. II. c. 3. (*p*) 4 Barn. & Ald. 57.

would be void for uncertainty. It was settled in the case next stated, that evidence of mistake in the name is admissible in this instance, and it was the opinion of Lord *Kenyon*, that error in the description might also have been shown by parol declarations of the testator, if made at the time of the will; and this seems very reasonable; for if parol evidence be admitted to raise an ambiguity, and correct a mistake alleged to exist in one part of the description, it seems but fair that it ought to be received, to show that the mistake was in the other. And with respect to the rejection of parol declarations of a testator, because they were not made at the date of the will, it seems to be now settled, that all conversations and declarations of testators, will be received where parol evidence is admissible, whether made *before*, *at the time*, or *after* the making of their wills; but with different degrees of weight and credit.(*q*) The following case is produced in support of what has been stated, except as to the admission of *parol* declarations of testators made *before* or after the dates of their wills.

In *Thomas* v. *Thomas*,(*r*) the testator devised to his "granddaughter, *Mary Thomas*, of *Llechlloyd*, in *Merthyr* parish," the reverson of his house in *Water-street*, in the borough *Caermarthen*. At the time of his death he had a grand-daughter named *Elinor Evans*, (one of the lessors of the plaintiff) who lived at *Llechlloyd*, in *Merthyr* parish, and a *great* grand-daughter, named *Mary Thomas* (the defendant) who was the only person of that name in the family, and lived at *Greencastle*, in the parish of *Llangain*, some miles distant from *Merthyr* parish; in which latter parish she had never been during her life. In an ejectment tried at the assizes for *Hereford*, the plaintiff's counsel proposed, and was permitted to give parol evidence of a mistake in the *name* of the devisee, the effect of which was, that when the drawer of the will read it over to the devisor, the latter observed, there was a mistake in the name of the devisee; to which the drawer in answer said, he would rectify it; and the former replied, that there was no necessity, since the place of abode and parish would be sufficient; but the jury, being of opinion that there was no such mistake, found a verdict for the defendant on the first count, which laid the demise from *Elinor Evans* and her husband. The claim of *Elinor*, as the intended devisee, being disposed of, the question was between the plaintiff claiming under the testator's co-heirs and *Mary Thomas*, as the supposed devisee, whose counsel offered evidence of declarations made by the devisor *prior* to making his will, expressive of regard for his *great* grand-daughter, the defendant, and of his intention to give her the *Star*, in *Water street*. This evidence was rejected upon the principle, that it was inadmissible to show whom the testator meant, as that intention was only to be collected from the will.

And although the Court of *King's Bench* declared that the evidence was properly rejected, yet it did not do so on the ground upon which it was first refused, but because it consisted of declarations by the devisor *long before* the date of his will; Lord *Kenyon* expressly stating, that had they been made at the time of the will, he should

(*q*) Per Lord *Eldon*, in *Trimmer* v. *Bayne*, 7 Ves. 508. and see *ante*, p. 137.
(*r*) 6 Term Rep. 671.

have thought them admissible in evidence as was noticed in the introductory observations to the case.(*s*) The decision of the Court, therefore, rested upon the sufficiency of the will to remove the ambiguity which had been raised by extrinsic evidence of the circumstances of the testator's family; but as the context was unable to dispel the obscurity, and parol evidence, which might have had the effect, was rejected on account of its not being contemporary with the will, the Court was under the necessity of declaring the devise to be void for uncertainty, Lord *Kenyon* justly observing, that as *Mary Thomas*, the person *named*, was neither grand-daughter of the devisor, nor resided in the place and parish described, but *Elinor Evans*, who was *not* named, was the testator's *grand*-daughter, and lived in the place and parish mentioned in the will, certainty as to the person of the devisee could not be attained, and consequently the heir of the devisor was entitled.

The last case, therefore, does not appear to be an authority that parol evidence is inadmissible to ascertain the person of the devisee, when a correct name is followed by a false description, applicable to another person of the family, but of a different name.

It is, however, an instance of latent ambiguity in a will, raised by extrinsic evidence, introducing such a degree of uncertainty in the testator's intention, as to disappoint the devise, in consequence of the will and the evidence being insufficient to ascertain the intended object of his bounty. But,—

5. When the parol evidence is sufficient to raise a latent ambiguity in the description of the legatees, which, without its production, would have entitled them to the money as answering the terms of the bequest; in such a case, as the existence of any mistake is problematical, unless the evidence clearly show error in the description, and that other persons were meant by the testator instead of those described, it will be insufficient to substitute the claimants in the places of those answering the description. And that such evidence is admissible, appears from the two cases after stated.(*t*) Suppose, then, a bequest to be made to the children of a particular person by his baptismal name, but which he had *changed* prior to the date of the will; or to the children of a person as in existence, who happened to be *then dead;* although parol testimony be admissible to show those facts, yet as they may have been unknown to the testator, and therefore afford no clear evidence of his intention to benefit the children of any other person than of him described, evidence of mistake in the testator in describing the parent of the legatees so as to entitle children of another person not mentioned on the ground that his name was intended instead of that inserted in the will, must be strong and relevant, or the children of the person described will be entitled to the legacy.

Accordingly in *Delmare* v. *Robello*,(*u*) a testator bequeathed the interest of his residuary estate in trust for all the children of his two sisters *Reyne* and *Estrilla*. *Reyne* was never married, and prior to the will she became a convert from the *Jewish* to the *Roman Ca-*

(*s*) See preceding page.
(*t*) Also see Sir *John Strange's* observations. 2 Ves. sen. 217.
(*u*) 3 Bro. C. C. 446. 1 Ves. jun. 412. *S. C.*

tholic religion, also a professed nun, was baptized by the name of *Maria*, and lived at *Genoa*. In addition to *Reyne* and *Estrilla*, the testator had another sister named *Rebecca*, and both she and *Estrilla* were married, and resided at *Leghorn*. *Rebecca* had several children who claimed by the will the interest bequeathed to the children of *Reyne*, upon the ground that the latter name was inserted by mistake for that of *Rebecca*. And in support of the claim they offered parol evidence of the circumstances of the family, as also of declarations by the testator that he intended to provide for the children of his sisters at *Leghorn*. The introduction of this evidence was resisted, yet Lord *Thurlow*, not only permitted it to be read, but pronounced his decree upon the effect of it, declaring that in his opinion it was not sufficient to induce him to presume that the testator meant his sister *Rebecca* instead of *Reyne*,(*x*) for the expressions in the will were so large as to induce a belief that the testator did not regard the circumstance of his two sisters then having children or not, but that he intended to include all the children they might possibly have. He (the testator) took no notice of the situation of the two sisters at *Leghorn*, nor of that of the other, and his Lordship said he was not satisfied, that if the testator knew he had a sister named *Rebecca* at *Leghorn* with children, he meant to provide for them; for if so he would have named her by her right name, his knowledge of which was not doubted. It was upon such reasoning that his Lordship pronounced on the insufficiency of the parol evidence.

The last case was followed by *Holmes* v. *Custance*.(*y*) There the testator gave "to the children of *Robert Holmes* late of *Norwich*, and now of *London*, the sum of 100*l*. a piece." The legacies were claimed by *James* the surviving child of *Robert Holmes*, but which was resisted under the following circumstances that were proved in the cause. The testator had two relations named *Robert* and *George Holmes*. The former died in *London*, previously to the date of the will, leaving the plaintiff his only child, another, whom he had, having died in infancy. *Robert* left *Norwich* for *London* at an early age, in which latter place he resided until his death. *George Holmes*, the other relative, formerly lived at *Norwich*, but resided in *London* when the testator died. He had several children; some of whom lived at *Norwich*, and were in habits of intimacy with the testator. The children of *George*, therefore, claimed the legacies given to the children of *Robert Holmes*, insisting that the name of *Robert* was inserted by mistake instead of the name of *George*. But Sir *W. Grant* was of opinion that the evidence was insufficient to authorize him to vary the description in the will, and remarked that if the present had not been a case of competition, but the executor had taken the objection, the name of *Robert Holmes* being found in the will, very strong evidence would be necessary. His Honour then proceeded to comment upon the evidence as follows: "As to the *mistake* of the *name*, what I am to collect is, either, if the testator himself wrote the will, that he wrote the name "*Robert*" by mistake when he meant "*George*;" or, that if another person wrote the will, that person by misapprehension of the testator's instructions wrote the name of

(*x*) 3 Bro. C. C. 451. (*y*) 12 Ves. 279.

"*Robert*" for "*George.*" Then, considering it as a case of competition, none of these circumstances will do. First, as to the description, "late of *Norwich*," not answering to *Robert*, who had not resided there for many years, every one knows the sense of "late" is, not recently, but formerly, of *Norwich*. Then, as to the circumstance, that he was not living at the date of the will; he was at a distance, and the testator might not have known of his death, or might have forgotten it. As to his having left only *one* child, the legacy being given to "the children," the testator living at a distance, might not have known the state of his family, and meant only, that if he had children, they should have the legacies. In the case *Delmare* v. *Robello*,(*a*) the evidence was very strong, amounting to a high degree of probability, that the testator intended his sister *Rebecca;* yet Lord *Thurlow* would not venture so to decide. I cannot, therefore, vary the will upon this evidence."

The two last cases are authorities for the admission of *parol* evidence to raise a latent ambiguity, and then to show error in description under circumstances where there were persons literally answering the terms of the bequests. They are instances of facts produced, which, when compared with the wills, raised presumptions of problematical mistakes; *i. e.* of the possibility of the testator's having been mistaken in describing the legatees; an ambiguity of the slightest kind, yet sufficient on general principle to authorize the admission of verbal testimony to show in what particulars the errors consisted, and to rectify them.

Another class of cases falling under the head of problematical errors, inferred from the state of the testator's family compared with the description in the will, and presumed in order to support the legacies, although probably no mistakes were in reality committed, is, when bequests are made to a part only of a class of persons answering the same description, but the will does not distinguish the particular objects of the testator's bounty.

It is settled, that if a testator bequeath to part only of a number of individuals of the same description, and none of them are named nor can be identified, either by the will or by extrinsic evidence, it is to be *presumed* that he intended the whole class of persons, and was mistaken in the number when confining his bounty to *three* or *four* of the class by the insertion of those words. These restrictive expressions are therefore rejected, and the entire number of individuals answering the description are admitted as legatees. Suppose, then, a legacy was given to the *three* children of *A.*, and *A.* had *four* children at the time of the will; the word "three" would be rejected upon the presumption of mistake, and the four children of *A.* would divide the legacy among them. Such a presumption is doubtless unsatisfactory, and nothing but necessity can warrant it. That necessity is, to give effect to the bequest; for if all the children were not supposed to be intended, the legacy would be void from the impossibility of discovering which of them were intended by the description of *three* children, there being *four*.

In *Tomkins* v. *Tomkins*,(*b*) the testator, after giving to his sister 20*l.* bequeathed "to her *three* children 50*l.* a piece." The sister had

(*a*) See preceding page. (*b*) 19 Ves. 126, in notes.

four children; and each of the *four* was declared to be entitled to a legacy of 50*l.*

That case was followed by Lord *Kenyon* in *Stebbing* v. *Walkley*.(*b*) The bequest was of 82*l.* three per cent annuities, in trust for the *two* daughters of *Titus Stebbing*, in equal shares, for so much of the term therein as they should live; and if *either* died before the end of the term, the whole was to belong to the survivor; but if *both* died before that time, the legacy was to fall into the residue. Mr. *Stebbing* had *three* daughters at the date of the will; and his Lordship determined that the three were equally entitled.

The first of the two last cases was the authority upon which Sir *W. Grant*, M. R. pronounced his decree in *Garvey* v. *Hibbert*.(*c*) There Mr. *Mauduit* bequeathed to the "three children of *Deborah Duval*, wife of Dr. *B. Duval*, 600*l.*" Mrs. *Duval* had *four* children when the will was made, and the legacy was decreed to the *four*. His Honour remarked, that the ground upon which the Court had proceeded, was, that it was a mere slip in expression; the meaning was, *all* children, or *all servants;* and the Court, *conceiving* the intention to be to give to each child so much, strikes out the specified number.

An instance of the Court having acted upon this presumption on a bequest to *servants*, occurred in *Sleech* v. *Thorington*.(*d*) In that case the testator bequeathed to the *two* servants *who should be living* with her *at her death* 100*l.* new *South Sea* stock, in equal shares. The testatrix had two servants in her employ when she made her will, and afterwards took another, who was in her service at the period of her death. And Sir *Thomas Clarke*, M. R. determined, that the *third* servant was entitled with the other *two*, upon the ground, that whatever was the number of servants living with the testatrix at her decease, she meant that the whole should participate in the bequest.

The principle upon which the last case was decided applies to that next stated. Neither of them is so strong as the preceding authorities against the presumption of mistake in the testators; for the expressions in the two wills showed the intent to comprehend *all* the persons answering the descriptions, so as to authorize a rejection of the restrictive words as repugnant.

In *Scott* v. *Fenoulhett*,(*e*) the testator bequeathed to *Captain Compton* 500*l.* and the like sum to *each* of his daughters, if *both* or *either* of them survived *Lady Chadwick;* an event which happened. The captain had *three* daughters at the date of the will; and first Lord *Bathurst*, and secondly, Lord *Thurlow*, determined that the *three* daughters were entitled.

In all these cases, evidence *dehors* the will of the state of the families of the legatees was necessarily admitted, and from which sprung the uncertainty in regard to the particular persons intended by the testators, who, in bequeathing to a specific number of a class of individuals, omitted to distinguish the select objects of their bounty from the rest. If then the Court had not in the preceding cases rejected the restrictive words, and let in all the persons in each de-

(*b*) 2 Bro. C. C. 85, ed. by *Belt*, and stated as corrected by him from Reg. Lib.
(*c*) 19 Ves. 125. (*d*) 2 Ves. sen. 561. (*e*) 1 Cox, 79.

script class, the legacies must have been void for uncertainty; for no evidence was offered of intention in favour of any of the individuals in preference to the others.

That such evidence would have been admissible, will appear on reference to the cases in this and the two preceding sections. It is true that the decree in *Dowset* v. *Sweet*,(*f*) as to this point, seems to the contrary; but that decision has been always considered of no authority. The testator gave "to the son and daughter of *W. Wicker*" a legacy of 100*l*. *Wicker* had *four* sons and one daughter; and upon a question as to which of his sons was entitled, it was determined that none of them should take the legacy in consequence of the uncertainty of description, but that the daughter should receive the whole.

Upon this decision Lord *Thurlow* made the following remarks: "It is almost impossible to say, that if there be a bequest to the son and daughter of one, who at the time of the bequest has four sons and a daughter, there is not such a dissonance between the state of the facts and of the bequest as to let in satisfactory evidence that *one* son was meant, as it is clear that he meant one. It is within all the rules of latent ambiguity. I suppose, therefore, that the case of *Dowset* v. *Sweet* went upon the ground, that the evidence was not sufficient to show the intention, and then it became uncertain."

Whether the defect in the evidence ought to have produced a decree against the sons, as supposed by Lord *Thurlow*, is open to these observations: that there seems as much reason to *presume* the testator or transcriber of the will to have made a slip in writing the word son for sons, as that the testators, in the preceding cases, were mistaken in the *number* of legatees. The state of *Wicker's* family when compared with the description in the will, cannot fail to strike every reader, of the great probability that all his sons were intended to be included by the testator, and that the omission of the letter *s* to son, was a mere clerical mistake. The will itself seems to be sufficient to correct it; for where a man has sons and one daughter, and a bequest is made to his "son and daughter," the intention of the testator to provide for *all* the sons, as well as the *only* daughter, is so apparent, as to convince every person of common intellect, that the omission of the letter *s* to "son," was a mere slip of the pen. The case is quite different from that of a legacy to *one* of the sons of a particular person, who had many; for there the ambiguity is *patent*, upon the will, and only one of the sons was intended, who not being designated, and evidence to ascertain him being inadmissible, the bequest is necessarily void, for *uncertainty*.(*g*)

That evidence is admissible to ascertain what particular persons were intended under the bequest to the three children of *A.* when *A.* had *four* or more, the following is an authority:

In *Hampshire* v. *Peirce*,(*h*) the testatrix bequeathed 100*l*. "to the *four* children of her late cousin *Eliz. Bamfield*;" who at the date of the will, had two children by a former husband, and four by a second; all of whom survived her. Upon a question whether parol evidence was admissible to show that the testatrix meant the four

(*f*) Ambl. 175. (*g*) 2 Vern. 624. (*h*) 2 Ves. sen. 216.

children of Mrs. *Bamfield* by a second husband? Sir *John Strange*, M. R. decided in the affirmative; because the evidence which removed the latent ambiguity raised by the introduction of the state of Mrs. *Bamfield's* family, did not contradict the will, but merely determined which four of the children were intended by the testator, and he determined upon the evidence in favour of the four children of Mrs. *Bamfield*, by her second husband.

But when the effect of parol evidence would be, to contradict the will, it cannot be received in the face of the Statute of Frauds.

Accordingly, in the same case of *Hampshire* v. *Peirce*, the testatrix gave "*to the children* of her late cousin, *Eliz. Bamfield*, 300*l.*" Evidence was tendered to show, that she meant the four children which *Eliz.* had by her second husband, in exclusion of the two by her first; although they were included under the description in the will. But Sir *John Strange*, M. R. rejected the evidence for the reason before mentioned, and declared that all the children of *Eliz.* were entitled.

Having in the two preceding sections, traced the consequences of errors in the names and descriptions of legatees, which were discovered upon the production of extrinsic evidence, we shall lastly consider—

Sect. XIX. The Consequences of Imperfect Descriptions of, or reference to Legatees appearing upon the face of wills, and when parol Evidence is admissible.

Instances of imperfect descriptions of, or references to legatees appearing upon the face of wills may occur: 1. When a blank is left for the christian name of a legatee; or, 2. where the whole name is omitted; or, 3, when the testator has merely written the initials of the name; or 4, when legatees have been once accurately described, but in a subsequent reference to one of them, to take an additional bounty, the person intended is doubtful, from ambiguity in the terms.

For the sake of perspicuity, it is proposed to consider each of the before-mentioned subjects in regular order; first premising that it is a general rule that parol evidence is admissible upon *latent* ambiguities, and not upon ambiguities which are *patent*, *i. e.* such as are apparent upon the will itself. That this distinction is attended with minute nicety of discrimination in some instances, will appear from cases afterwards produced. If, when upon opening wills, such bequests are found, as "to *Jones*, the son of *Jones*;" or "to Mrs. *B.*" and parol evidence is admitted to ascertain the persons intended by those ambiguous terms, it would seem a vain attempt to justify that admission upon the doctrine of *latent* ambiguity, when the ambiguity is *patent* upon the will. The principle upon which parol testimony is admitted in those cases, is probably, in the first of them, a presumption of possible ignorance in the testator of the christian name of the legatee, and in the second, a similar presumption of his being in the habit of calling the person by the name of Mrs. *B.* Presumptions, which being raised upon the face of the will, may be confirmed and explained by extrinsic evidence. Upon these grounds the admission of parol evidence in those two instances, will be consistent with the established doctrine of its admissi-

bility, to raise and remove *latent* ambiguities (of which examples have been before given;) and of its not being admissible when offered to explain a *patent* ambiguity in the will, of which the Court of *King's Bench* proposed an instance in *Edward Altham's* case:(*i*) "If *A.* by deed, give goods to *one* of the sons of *J. S.* who has several sons; he shall not aver which son he intended; for by judgment in law upon this deed, the gift is void for the uncertainty, which cannot be supplied by averment." And there is no difference between a deed and a will, as to this matter.(*k*) We shall now proceed to consider—

1. When a blank is left for the *christian* name of the legatee.

That parol evidence is admissible to supply an omission of the christian name of a legatee, is proved by the case of *Price* v. *Page*,(*l*) in which the testator bequeathed "to *Price*, the son of *Price*, the sum of 100*l.*" No person but the plaintiff claimed the legacy, and he produced evidence from which it appeared, that he was the son of a niece of the testator; that his father's and grandfather's names were *Price*, that the testator had no other relation of that name, that he lived on terms of affection with the plaintiff, contributed to his maintenance, placed him with an attorney, and paid the duty on that occasion, and that the testator said he had or would provide for the plaintiff, and that he had left him something by his will. Upon this evidence, Lord *Alvanley* determined in favour of the claim. But—

2. When the omission consists of the entire name of the legatee, parol evidence cannot be admitted to supply the blank, for that would amount to a bequest by oral testimony.

Thus in *Winne* v. *Littleton*,(*m*) *A.* bequeathed all his personal estate to his executor, leaving a blank, and died without naming any person executor. The legacy was adjudged to be void.

So in *Baylis* v. The *Attorney General*,(*n*) the testator gave 200*l.* to the ward of *Bread-street*, according to Mr. his will. Lord *Hardwicke* would not allow the blank to be supplied by parol evidence.

And in *Hunt* v. *Hort*,(*o*) a woman devised her houses in town and at *Richmond* to her niece, Dame *Margaret Hort*, and *Richard Baker*, her attorney, in trust to sell. She then gave some pictures specifically, and thus proceeded: my other pictures to become the property of Lady (leaving a blank after the word lady.) The testatrix then made her niece, *Harriet Hunt*, residuary legatee, and appointed Lady *Hort* and *Richard Baker* her executors. Lord *Thurlow* was of opinion that he could not supply the blank by parol evidence, and observed, that where there was only a *title* given, it was the same as a total blank.

3. If, however, a legatee be described by *initials* of his name only, parol evidence may be given to prove his identity.

This was done in the case of *Abbot* v. *Massie*,(*p*) where the bequest was, "Pint silver mug, and all my china, to Mrs. *G.* and 10*l.* for mourning," Mrs. *Gregg* claimed the legacies, and, the Master having refused testimony, offered to show that she was the person

(*i*) 8 Rep. 155. a. (*k*) 2 Vern. 624. (*l*) 4 Ves. 680. (*m*) 2 Ch. Ca. 51.
(*n*) 2 Atk. 239. (*o*) 3 Bro. C. C. 311. (*p*) 3 Ves. 148.

intended; exception was taken to his report. Upon which the Court declared, that he ought to receive evidence, but legal evidence, to prove who Mrs. *G.* was.

4. And with respect to a patent ambiguity arising from an imperfect reference to one of two legatees correctly described in a prior part of the will, parol evidence is inadmissible to show which of them was intended, so that the additional legacy intended for the one will depend upon the removal of the obscurity by a sound interpretation of the whole will.

An instance of this kind occurred in a case of *Castledon* v. *Turner*.(*q*) The testator gave his real estates to his wife *Alicia*, for life, remainder to *M. Dinton*, niece to his said wife. *Item*, he gave "the use of 500*l*. stock, for and during *her* life, but after *her* death, he gave the 500*l*. among the brothers and sisters of the said wife." The question was, whether by the relative word, *her*, the niece or the wife was intended? And it seems that parol evidence was offered of the testator's intention,(*r*) but Lord *Hardwicke*, after rejecting that testimony, determined in favour of the wife, upon a sound and grammatical construction of the will.

The last case was followed by *Fox* v. *Collins*,(*s*) but differing from it in this particular, that no parol evidence was offered, and if any had been tendered, the case just stated would have been an authority for rejecting it. In *Fox* v. *Collins* the testator first provided for *Sidney Collins*, the second daughter of his deceased uncle, *Thomas Collins*, late of *Huntingdon*. He next made provision for the son of his said uncle *Thomas*, and then gave a legacy to the defendant, *Ann Collins*, of *St. Ives*, a daughter of his uncle *Thomas*; and also a legacy to *Edward Collins*, a grandson of *Thomas*; but if *Edward* died before the testator, the legacy was to go to his children, if he left any: and if there were none, the money was to be applied as part of the testator's residuary estate. The next objects of the testator's bounty were the descendants of his deceased uncle, *Robert Collins*, one of whom was named *Ann Collins*, and resident at *Bromyard* in *Huntingdon*, and was so described. The testator, after giving some legacies, bequeathed his residuary personal estate, "to the said *Sidney Collins*, *Ann Collins* and *Sarah Collins*, in equal shares. The question was, which of the two *Ann Collins* was meant by the testator? And Lord *Northington* determined in favour of *Ann Collins* of *St. Ives*, the daughter of *Thomas*, the uncle. 1st, Because the descendants of *Thomas* appeared to be the primary objects of the testator's bounty, and as such first named in the will; and the direction for the legacy to *Edward* (grandson of *Thomas*) to fall into the residue upon the contingencies before mentioned, appeared to his Lordship material evidence of the testator's intention, that the residue should be divided among the descendants of *Thomas*. And, 2dly, because, in addition to those circumstances, the name "*Ann Collins*" in the residuary clause was placed between two of the descendants of *Thomas*, whence his Lordship was satisfied upon what appeared in the will, that *Ann Collins*, the daughter of *Thomas*, was the person designated by the description of "*Ann Collins*."

(*q*) 3 Atk. 257. (*r*) 2 Ves. sen. 217. (*s*) 2 Eden. 107.

CHAPTER III.

Of Specific Legacies.

IT is proposed to consider in this Chapter, What are and what are not Specific Bequests of personal property. The subject will be discussed under the following arrangement:

SECT. I. What are Specific Legacies, and the privileges and disadvantages attending them.
SECT. II. Specific Legacies of individual personal chattels.
SECT. III. Specific Legacies of, and relating to *real* chattels and estates.
1.—*Of real chattels.*
2.—*Of rents and annuities out of real chattels and estates.*
3.—*Of gross sums of money out of them—and*
4.—*Of the produce from their sales.*
SECT. IV. Specific Legacies of sums of money and personal annuities.
1.—*Of money.*
2.—*Of annuities.*
SECT. V. Specific Legacies of stock or annuities *in public funds.*
1.—*Effect of "my" preceding the word "stock."*
2.—*Bequests of stock generally.*
3.—*Construction when stock is bequeathed generally* in *a particular fund.*
4.— - - - *when expressly* out *of particular stock.*
5.— - - - *when* not *expressly* out *of stock, but stock is mentioned as the fund in which the money bequeathed is, or is supposed to be invested.*
SECT. VI. Colonial property.
Legacies of, when and when not specific.
SECT. VII. Legacies of debts.
1.—*When specific.*
2.—*When not.*
SECT. VIII. Bequests of general personal estate.
1.—*When specific.*
2.—*When not.*

SECT. I. What are SPECIFIC LEGACIES, and of the privileges and disadvantages attending them.

A regular specific legacy may be defined, "the bequest of a particular thing or money specified and distinguished from all others of the same kind, as of a horse, a piece of plate, money in a purse, stock in the public funds, a security for money, which would immediately vest with the assent of the executor." It differs from a

general or * pecuniary legacy in this respect, that if there be a deficiency of assets, the specific legacy will not be liable to abate with the general legacies; and on the other hand, if such specific legacy be disappointed, as by failure of the specific fund, the legatee will not be entitled to any recompense or satisfaction out of the personal estate of the testator.(*a*)

But there are legacies of quantity *in the nature* of specific legacies, as of so much money with reference to a particular fund for their payment.(*b*) This kind of legacy is so far *general*, and differs so much in effect from that first described, that if the funds be called in or fail, the legatees will not be deprived of their legacies, but be permitted to receive them out of the general assets; yet the legacies are so far specific, that they will not be liable to abate with general legacies upon a deficiency of assets.(*c*)

It is true, that this anomalous kind of specific legacy was thought a refinement by Lord *Thurlow* in *Ashburner* v. *M'Guire*;(*d*) yet, it will appear from the authorities after-mentioned, that a distinction has been established, in accordance with the civil law,(*e*) between the bequest of a sum of money, with reference to a security or debt for its payment, and the gift of the security itself, and that they are attended with the different consequences before stated. We shall proceed to consider,—

Sect. II. What Legacies of individual personal Chattels, are and are not specific.

The intention of testators upon this subject, as in every question on the construction of wills, is the principal object to be ascertained; and it is therefore necessary, that the intention be either expressed in reference to the thing bequeathed, or otherwise clearly appear from the will, to constitute the legacy specific. What is sufficient for that purpose, may be collected from the definition given of a specific legacy in the beginning of the chapter, and from which it is a consequence.

That if *A.* bequeath in this manner: "the brooch which I received as a present from *A. B.*"; or, "my horse named Castor," &c.; such and the like bequests will be specific, for the object is

* In classing legacies, the words "general and specific" will, throughout the present work, be exclusively adopted, though there is highly respectable authority for using the word "pecuniary" synonimously with "general:" It is not however strictly accurate, for every general legacy is not pecuniary (*i. e.*) relating to *money*; and one species of specific legacy is of a pecuniary nature, so that there may be either a general pecuniary legacy, or a specific pecuniary legacy. The terms "general" and "specific" answer every purpose without involving any ambiguity.

(*a*) 1 Vern. 31. 1 P. Will. 422. 540. 679. 3 P. Will. 385. 3 Bro. C. C. 160.
(*b*) Touchst. 433. Ambl. 310. 4 Ves. 565. 3 Ves. & Bea. 5.
(*c*) 2 Ves. jun. 640. 5 Ves. 206. *Acton* v. *Acton*, 1 Meriv. 178.
(*d*) 2 Bro. C. C. 108.
(*e*) Si testator scripserit aureos quadringentos Pamphilæ dari volo, ita ut infra scriptum est, ab Julio autore aureos tot, et in castris, quos habeo tot, et post multos demum annos decesserit cum jam omnes summæ in alios usus translatæ essent, responsum fuit; Pamphilæ quadringenta deberi; quia vero similius est patrem familias demonstrare potius hæredibus voluisse, unde aureos quadringentos sine incommodo rei familiaris contrahere possent, quam conditionem fidei commiso injecisse, quod ab initio pure datum esset. Voet on Pand. 35. tit. 1. sect. 5.

accurately referred to and described, and the legacy can only be satisfied by a delivery *in specie*.(*f*)

Thus, a bequest of so many of the testator's horses as should amount to 800*l*. was held in *Richards* v. *Richards*,(*g*) to be specific.

But if it be uncertain from the description whether any particular horse or brooch was intended, so that the bequest may be satisfied by delivery of something of the same species of that mentioned, the legacy will not be specific. Thus, if *A*. having many brooches or horses, bequeath "a brooch" or "a horse" to *B*.; in these and such cases the legacies will not be specific but general.(*h*)

So also if there be error in the description in the chattel intended to be specifically given, the mistake may be of such a nature as not to be permitted to disappoint the specific bequest.

If, therefore, *A*. having one horse only, which is *white*, bequeath it to *B*. by the words my "*black* horse," the mistake is obvious and easily remedied, and the legatee will be entitled to the specific horse, although not of the colour described, for there can be no doubt of that being the horse intended for him, and the legacy will be specific.(*i*)

But if the testator had two white horses of different values, and intending one of them in particular for *B*. bequeathed it to him by the words, "my white horse," it is presumed that evidence is admissible, to show which of the two horses was intended.(*k*) It appears upon the face of the will, that one of the two horses was meant for *B*.; and the uncertainty respecting the one so intended, arises from the latent ambiguity developed by the comparison of the will with the testator's property: it seems, therefore, necessary to resort to such evidence in this case, upon the same principle which renders it admissible to determine which of two persons of the same christian name and surname is entitled to a legacy intended for one of them, but which is bequeathed by a description applicable to both legatees.(*l*)

SECT. III. With respect to LEGACIES of, and relating to, real CHATTELS and ESTATES.

1. A lease or term for years is as capable of being made the subject of a specific bequest as freehold estates; bequests or devises of which are always specific.

Accordingly, if *A*. bequeath his term for years in an estate at *B*. or the lease of his farm there,(*m*) or "the lease which he *then* held,"(*n*) or "all his tithes payable out of *C*.,"(*o*) (he having a lease for years of such tithes), or if after bequeathing his leasehold estate to *A*. for life, he afterwards give it to *B*. by the words, "all my estate, term and interest *therein*," (expression which must be confined to his estate, term and interest in the then existing lease, and not be extended to any future lease;(*p*) or if *A*. devise his leasehold estate

(*f*) Touchst. 433. (*g*) 9 Price, 219. (*h*) 1 Atk. 417.
(*i*) Touchst. 433. and see chap. IV. sect. 4.
(*k*) See *Selwood* v. *Mildmay*, 3 Ves. 306. and 2 Ves. sen. 28. 1 Bro. C. C. 477: 13 Ves. 174.
(*l*) 1 P. Will. 421. 425. 3 Ves. 148. 6 Ves. 42. 2 P. Will. 140. Ambl. 374.
(*m*) 1 P. Will. 403. 693. (*n*) 2 Atk. 597.
(*o*) 2 Ves. sen. 419. 1 Bro. C. C. 263. (*p*) 16 Ves. 179.

to trustees, with a direction to apply the rents for the benefit of *C.* or to accumulate for a certain period, and then to pay or transfer the fund to *C.*; each of those bequests will be specific, for the intention is clear to sever the property from the rest of the personal estate, and to bequeath it specifically. As an instance of the case last supposed,—

In *Mayott* v. *Mayott*,(*q*) *A.* directed *B.* by will to take possession of his farm that he held under *C.* and the stock, crop, &c. and to carry on the farming business; and also that the net yearly produce from it should be placed at interest upon government security in the name of *D.* in trust to accumulate till his nephew *E.* had a son of the age of twenty-one, at which time the business of the farm, with such stock, crop, &c. as amounted to 1500*l* was to be assigned to him; but if *E.* had no such son, *A.* bequeathed such possession, stock, crop, &c. to the same amount, to the first son of his other nephew attaining twenty-one. And if there were no such son of either nephew, he gave the same amount of such stock, crop, &c. to *F.* and bequeathed the residue of the monies he had directed to be placed out as aforesaid in *D.'s* name, with 300*l.* stock, and all other his personal estate to *L. M.*, &c. *A.* was only tenant from year to year of the farm, and *C.* the landlord, would not permit it to be carried on by the executor of *A.* *The Master of the Rolls* decided, that since the farm could not be continued, the legacies could never become due, (*i. e.*) as they were intended to consist of the yearly net produce of the farm, it was a necessary consequence, that as the farm (the principal) was lost, the legacies, its accessaries, must share the same fate.

2. Since a term for years may be specifically bequeathed, so may a rent made issuing out of it; which is equally the case in relation to rents of other real estates. If, therefore, a term for years or other estate be bequeathed to *B.* and a rent out of it to *C.*, as the bequest to *B.* is specific, so is the rent given out of it to *C.*; for it must be inferred to have been the undoubted intention of the testator, from the forms of the bequests, to divide the fund between *B.* and *C.* by giving the term or estate to the one, and the rent out of it, to the other. And by whatever words expressed, or however collected from the whole will, if the intention clearly appear to give specifically, that intention will make the legacy specific, although a court of equity is well known to be averse to such a construction, on account of the consequences attending that species of bequest.

Accordingly in *Long* v. *Short*,(*r*) *A.* bequeathed 40*l.* a year to *B.* for life, out of his chattel estate at *Kenn*, and 10*l.* a year to *C.* for life, out of the same estate, which he gave to *D.* These several bequests were decreed by Lord *Cowper* to be specific, his Lordship remarking, that the devise of a rent charge out of a term, is as much a specific devise, as if it had been of the term itself.

In the last case, it must be observed, that the legacy was of a *rent*, part of the yearly produce of the term, and incapable of separation from it; hence the devise of the term being specific, the disposition of a portion of its rent was equally so, and the decision was in perfect unison with the testator's intention. If, however, the intention

(*q*) 2 Bro. C. C. 125. ed. by Belt. (*r*) 1 P. Will. 403. and see 2 Ves. sen. 623.

be apparent to give the legatee *an annuity*, for life, at all events, then although the annuity be given out, or be directed to be paid out of an estate or the rents of it, such annuity will be general, and not fail by the eviction of the fund, or the insufficiency of the charge of the legacy upon it. As an example of this—

In *Mann* v. *Copland*,(*s*) *A.* bequeathed as follows: "to *B.* my servant, I give an annuity of 10*l.* during his life, to be paid *out* of the *rents* arising from an estate of a house (which was freehold) in *C.* &c. should he be in my service at my death. There being a deed existing between me and my brother, whereby I give up all my interest in the house, which I have requested him by letter to cancel. These deeds are now in the possession of *D.* of, &c. It is my desire, if the deeds be not cancelled, that the sum of 200*l.* shall be secured from the sum of 2000*l.* five *per cents* navy, in trust for the said *B.* during his life, I also give to the said *B.* all my clothes and linen." The will was not properly attested to charge freehold lands; nor was the testator possessed of any navy annuities. The question was, whether the bequest of the annuity was general or specific; for if it were the latter, it could not take effect. But Sir *Thomas Plumer*, V. C. determined upon the construction of the will that the legacy was not specific; for, said his Honour, the intention is clearly marked to give *B.* a legacy of 10*l.* a year during his life, if he were in *A.'s* service at *A.'s* death, and which event happened; and that *A.* also gave him his clothes and linen. His Honour also observed, that *A. first gave* the annuity, and then proceeds to say out of what it was to be paid, first the real estate, if it existed, and next, the five *per cents;* but, said his Honour, the legacy might stand, although the fund out of which it was directed to be paid did not exist; that the legacy was not so specific and so connected with the fund as to fail if there were no such fund, it *appearing*, that there was a *fixed, independent, separate, distinct* intent to give the legacy; the particular property, out of which it was to be paid, being a secondary thought. The Court further remarked, that the testator meant to give 200*l.* out of his personal estate, to be set apart as a fund for payment of the legacy, and that there being a positive intent to give the legacy, although the mode, by which payment of it was to be secured, failed, yet the legatee was entitled to have it made good out of the personal estate.

3. So also if, instead of an annuity, a *gross* sum be given out of a term or estate, it would seem that such bequest would operate as a *charge* only upon the property; and be considered as a demonstrative legacy,(*t*) *i. e.* a gift of so much money, intended for the legatee at all events, with a fund (the estate) particularly referred to for its payment; so that if the estate be not the testator's property at his death, the legacy will not fail, but be payable out of his general assets. This is one of that class of legacies, mentioned in the beginning of this chapter, as not being regular specific legacies, but *in the nature* of specific legacies. The above observations will reconcile the case last stated with that of *Savile* v. *Blacket*, and the other authorities after mentioned upon this species of bequests.

(*s*) 2 Madd. 223. (*t*) 4 Ves. 751.

In *Savile* v. *Blacket*,(*u*) *A.* having a *power* of charging 1000*l.* upon lands (which power he afterwards destroyed,) bequeathed 1000*l.* to his child *B. out* of the lands, and also 1000*l.* which he charged upon his personal estate. The first 1000*l.* not being an effectual charge upon the lands in consequence of the destruction of the power, the question was whether the bequest was not specific and therefore failed? But Lord *Macclesfield* decided in the negative, observing, that it was the intention to leave *B.* the above two sums, the one charged, by express words, on the *personal* estate; and the other upon the lands; that if a legacy were given to *J. S.* to be paid *out* of such a particular debt, and none was found owing, or, there being one, it failed, still the legacy ought to be paid, and the failing of the *modus* appointed for payment should not defeat it.

Upon the same principle the decision was made in the recent case of *Fowler* v. *Willoughby*.(*x*) In that case the testator directed a legacy to be paid out of the produce of an estate which he had contracted to purchase, but which contract could not be completed; and it was held, that the legacy should be paid out of the testator's general assets, though the particular security intended by him happened to fail.

4. It appears that the principle of the decision of *Savile* v. *Blacket* was the intention of the testator not to make the legacy depend upon the due execution of his power, but to bequeath a sum equivalent to what he was entitled to charge upon the estate, with reference only to that estate as the primary fund for payment of it; that such was the testator's intention, appeared to Lord *Macclesfield*, upon the construction of the whole will. Following then the same principle, viz. the intention of testators, if a testator direct his freehold or leasehold estates to be sold, and dispose of the proceeds in such a form as to evince an intention to bequeath them specifically, the testamentary dispositions will be specific, the money is sufficiently identified and severed from his other property; and since he has sufficiently marked his intent to distribute the identical proceeds, the bequests are accompanied with all the requisites of specific legacies.

An instance of this kind occured in *Page* v. *Leapingwell*.(*y*) In that case *A.* devised to *B.* real estates in trust to sell, but *not for a less* sum than 10,000*l.*; and he directed *B.*, out of the monies arising from the sale, in the first place, to lay out the sum of 3000*l.* in purchasing a benefice for his godson, *C.* He also directed *B.*, by and out of the monies arising from such sale as aforesaid, to lay out the sum of 4000*l.* in the purchase of lands in the county of *Essex*, and as his nephew *D.* should choose; and he further directed *B.* by and out of the monies arising from such sale as aforesaid, to place the sum of 500*l.* at interest in the funds in his own name, and to pay the dividends to *E.* for life, and afterwards to divide the principal as therein mentioned. The testator then gave three legacies of 100*l.* each, and directed *B.* after payment of the above legacies, to invest in the public funds *all* the *overplus* monies arising *from the sale* of his said real estates, and to pay the dividends to *F.* and *G.* equally. The testator then proceeded to dispose of other parts of his property,

(*u*) 1 P. Will. 778. (*x*) 2 Sim. & Stu. 354. (*y*) 18 Ves. 463.

and concluded with a *general* residuary bequest. The proceeds from the sale of the lands were less than 7000*l.* The questions were, whether the legacies were specific? and if so, whether *F.* and *G.* were entitled to any part of the fund with the other legatees, since what was given to them appeared to be residuary. And Sir *W. Grant*, M. R. was of opinion that the legacies were specific, upon the principle that the testator *assumed* he had at least 10,000*l.* proceeds from the sale to dispose of, and that he portioned them out among the legatees. His Honour also considered the testator to mean that *F.* and *G.* should take at the least what should remain after payment of the specific legacies, viz. 2200*l.* (the testator assuming that the proceeds would amount to 10,000*l.*, but if to more, then intending them the excess.) The determination was, that if the lands had produced 10,000*l.* the shares of *F.* and *G.* in it, would have been 2200*l.*; *F.* and *G.* were therefore entitled to so much of that sum as remained, after abating rateably with the other specific legatees.

SECT. IV. As to Legacies of Money and Personal Annuities.

1. That money may be the subject of a specific bequest is a point firmly settled.(*z*)

Suppose *A.* to bequeath to *B.* 1000*l.* deposited in a certain chest, bag, or purse, or in the hands of *C.*, the lagacies will be specific.(*a*) In these instances the money is separated from the general personal estate, and is described in that condition, so that the bequest of it falls within the before-mentioned definition of a specific legacy. The intent is clear to give the *identical* money, and not a sum of the like amount generally, which would be merely a general legacy. The legatee therefore can say to the executor, give me the 1000*l. in specie* which are in the chest, bag, or purse, or in the hands of *C.* for that specific money is mine.

Thus in *Ellis* v. *Walker*,(*b*) *A.* the partner of *B.*, bequeathed to *B.* 2000*l.* which appeared to be due to *A.* on the last settlement, in trust, to pay the interest of 1000*l.* to his (*A.'s*) mother, and the interest of 300*l.* to his aunt, for their lives; and after their death he gave 1500*l.* to *C.* and 500*l.* to *D.* "if he did not draw it out of trade before he died." The question was, whether the 2000*l.* were so given as to constitute a specific legacy? And Lord *Hardwicke* decided in the affirmative, for, said his Lordship, the testator being partner with *B.* made up with him an account by which 2000*l.* (that is in *value*,) appeared to belong to the testator; *B.* would not have been answerable for 2000*l.* at all events, but only for the testator's share of the stock. It was not a gift of 2000*l.* debt, but of so much out of the partnership stock, yet, said his Lordship, the latter words, "If I do not draw it out of the trade," make great alteration, and in my opinion make the legacy specific.

But when the language of the bequest is such, that neither by reference to any collateral thing, can the money bequeathed be distinguished from the testator's other monies, nor a clear intention be

(*z*) See sect. 7. as to specific legacies of debts.
(*a*) 1 Atk. 508. 1 P. Will. 540. 2 P. Will. 164. *Pulsford* v. *Hunter*, 3 Bro. C. C. 416. (*b*) Ambl. 309.

perceived to give a *specific* part of his personal estate, such a bequest will be general; it does not fall within the definition which has been given of a regular specific legacy. The legatee is unable to point out to the executor any particular sum of money that he can call his own, as he had the power of doing in the former instances. The legacy, therefore, must necessarily be general. An instance of this occurs in the common bequest of a sum of money, without mentioning out of what fund it is to be paid. The legatee has no particular part of the personal assets to resort to, but the intention is satisfied by the executor's payment of the legacy out of any portion of them.

In *Richards* v. *Richards*,(*c*) a legacy of 400*l.* cash was determined to be a general legacy.

It is also to be remarked, that it is *not* the *object* or *purpose* for which a legacy is directed to be applied that make it specific, but (as before observed) the intention of the testator expressed or clearly appearing from his will in reference to the thing given, so as to separate and distinguish it from his other property. Hence it follows, that whatever may be the relationship of the legatee to the testator, or whether the legacy be by absolute gift, or to a person in trust, and to be the subject of settlement upon several persons, such legacy, if given generally, will be general, not specific.

It was accordingly decided in the modern case of *Apreece* v. *Apreece*,(*d*) that 50*l. a piece* bequeathed by *A.* to *B.* and *C. for rings*, were not specific legacies.

So also it was determined in the *Attorney General* v. *Robins*,(*e*) that legacies of 60*l.* a piece to *executors*, for their care and pains should not be preferred to general legacies, and consequently that they were not specific, which determination was approved by Lord *Hardwicke* in *Heron* v. *Heron*.(*f*)

And it was holden in the same case of the *Attorney General* v. *Robins* that bequests of 5*l.* a piece to *servants* were not entitled to any preference to others.

Charities too are not exceptions to this rule, for it was decided in the case last referred to, that legacies to charities had no preference to others, and were consequently not specific.(*g*)

And if a sum of money were bequeathed in trust to be laid out in the purchase of lands, or to be invested in government securities, neither of those purposes will make the legacy specific. The first point was so decided in *Hinton* v. *Pinke*,(*h*) the second in *Lawson* v. *Stitch*,(*i*) and again in *Gibbons* v. *Hills*.(*k*)

In the last case *A.* (amongst other things) directed 3920*l.* bank annuities to be purchased out of his personal estate for *B.*, *C.* and *D.* Upon the question, whether that direction amounted to a specific bequest? Sir *Thomas Clarke*, M. R. determined in the negative.

2. Upon the same principle that the several legacies before mentioned were adjudged to be general, it would seem that a *voluntary* bequest of *annuities out* of or *charged* upon personal estate, will not

(*c*) 9 Price, 219. (*d*) 1 Ves. & Bea. 364. (*e*) 2 P. Will. 23.
(*f*) 2 Atk. 161. 171. (*g*) 1 P. Will. 433. (*h*) Ibid. 539.
(*i*) 1 Atk. 507. (*k* 1 Dick. 324. and see 1 P. Will. 539. *S. P.*

be specific whether the legatee be a stranger or the *wife* or *child* of the testator; for whatever may be the intention imputable to a testator, when such a bequest is made in favour of a wife or child, it rests in probability only, and is defective in not being apparent in his will. Besides it is not (as before observed) the purpose or object to which a legacy is applicable that makes it specific, but the intention properly expressed or fairly and clearly to be collected from the will, to give a part of the testator's personal estate that can be distinguished and identified from the remainder.

In *Hume* v. *Edwards*,(*l*) an annuity charged upon the testator's personal estate was bequeathed to *A.* for life. And Lord *Hardwicke* determined upon the authority of *Alton* v. *Medlicot*, that the bequest was not specific.

In the case of *Alton* v. *Medlicot*,(*m*) there was a *direction* by will to lay out a portion of the personal assets in the purchase of an annuity. That direction was held to be a general, and not a specific legacy. Lord *Hardwicke* appears to have ascribed the decision to the form of bequest being merely a *direction* to lay out, &c. and not a gift of the annuity; but he observed, that the Court afterwards considered such a distinction too subtle, and had therefore decided(*n*) that an annuity by will out of personal estate by direct devise or legacy, should abate with general legacies. But it was observed by his Lordship, that such only was the *general* rule, for the *intent* of the testator on the construction of the will must be followed, if he *prefer* such annuitant before other legatees; and his Lordship thought that such intention appeared in the case of *Lewin* v. *Lewin*.(*o*) But since these bequests bear no similitude to specific legacies, and are admitted to be general,(*p*) and since the claims of the wife and children arose upon questions of their being obliged to abate, *pari passu*, with general legatees, the consideration of the cases upon this subject is postponed till we arrive at the seventh chapter, which treats of the abatement of general legacies.

SECT. V. Of Stock or Annuities in public funds.

From the definition of a regular specific legacy in the beginning of the chapter, it is obvious that *stock* or *government annuities* may be specifically bequeathed; but in order to make the bequests specific, the intention that they should be so, must be clear, otherwise the bequests will be general.

1. The word "my" preceding the word "stock" or "annuities" has frequently been adjudged sufficient to render the legacy specific. If, therefore, I were to bequeath to *B.* my capital stock, suppose 1000*l.* in that of the India Company,(*q*) or "1000*l.* in *my* stock," or "part of *my* stock",(*r*) the legacies would be specific.

2. But it seems to be settled that mere possession by the testator, at the date of his will, of stock or annuities of equal or larger amount than the bequest, will not (without words of reference, or an intention appearing upon the will that he meant the *identical* stock of

(*l*) 3 Atk. 693. (*m*) Cited 2 Ves. sen. 417. (*n*) *Hume* v. *Edwards*, above.
(*o*) 2 Ves. sen. 415. (*p*) Ibid. 421.
(*q*) *Ashburner* v. *M'Guire*, 2 Bro. C. C. 108. *Barton* v. *Cooke*, 5 Ves. 461. *Norris* v. *Harrison*, 2 Madd. 280. *Choat* v. *Yeats*, 1 Jac. & Walk. 102.
(*r*) 4 Ves. 750. 1 Eq. Ca. Abr. 302.

which he was possessed) make such bequest specific. In proof of this,—

A. bequeathed 1000*l.* capital *South Sea* stock to his wife for life for her separate use, with a power of disposition among her children. *A.* was possessed of 1800*l.* of that kind of stock when he made his will, which he afterwards reduced to 200*l.* and again increased by purchase to 1600*l.* It was one of the questions, whether the reduction was not an ademption, which depended upon a prior inquiry, whether the legacy was specific? And Lord *Talbot* was of opinion that the legacy was not specific, remarking that it was not the particular stock the testator was possessed of which he gave, but the bequest was merely descriptive of the *nature* of the thing given, of which he had sufficient to answer the legacy at the time of his death.(*s*) Again,—

In *Simmons* v. *Vallance*,(*t*) *B.* bequeathed as follows: he gave to *C.* the interest of 100*l.* new *South Sea* annuities, for life, and after his death to be equally divided among his children; and he also gave to *C.*'s children living at *B.*'s death, "the sum of 50*l.* each new *South Sea* annuities," with interest from his death, and the principal at twenty-one. *B.* further gave to *D.* the interest of 100*l.* new *South Sea* annuities for life, and after his death to devolve to *E.* When *B.* died he had 800*l.* new *South Sea* annuities standing in his name, which he was presumed to have had at the date of his will, although it was not stated. The only question was, whether these legacies were general or specific? And the *Master of the Rolls* was of opinion that they were general legacies, and therefore liable to abate with the other general legacies.

So also in *Wilson* v. *Brownsmith*,(*u*) *A.* bequeathed to *B.* and *C.* "200*l.* four per cent consolidated bank annuities." And it was one of the questions, whether the form of bequest was specific? And Sir *William Grant* decided that it was general, and not specific.

The three last cases are authorities that where a bequest is general of stock or annuities, the mere circumstance of the testator having the same, or a greater quantity of stock or annuities answering the description of those given, will not convert the bequest into a specific legacy. But the case of *Ashton* v. *Ashton* should be adverted to, which although it may, on the first impression, appear to militate against the last decisions, is yet capable of being reconciled.

In that case,(*x*) *A.* bequeathed to trustees 6000*l.* *South Sea* annuities, in trust to sell and lay out in the purchase of lands to be settled, &c.; and he afterwards by a codicil gave them a further sum of 1200*l.* to the same uses. *A.* having only 5360*l.* *South Sea* annuities at the date of his will, Lord *Talbot* determined the bequest of annuities to be specific; and, that therefore, the deficiency of the fund should not be supplied out of *A.*'s general personal estate.

It will have been noticed that in the last case, there were no

(*s*) *Partridge* v. *Partridge*, Forrest, 226.
(*t*) 4 Bro. C. C. 345. and see *Webster* v. *Hale*, 8 Ves. 411. *S. P.*
(*u*) 9 Ves. 180.
(*x*) Reported in Forrest, 152. and 3 P. Will. 384. Approved of in *Sleech* v. *Thorington*, 2 Ves. sen. 564. and adopted in principle by Lord *Thurlow* in *Danvers* v. *Manning*, 2 Bro. C. C. 18.

words of reference to any particular annuities which the testator had at the date of his will; hence, the inference that he intended the identical *South Sea* annuities he was *then* possessed of, must have arisen from some other circumstance, namely, the gift of them to the trustees in the form of a *present legacy* in trust *to sell;* and which it is presumed distinguishes this case, and reconciles it with the authorities before stated. So explained, there does not appear to be any case with which the present is inconsistent, or by which it has been either expressly or necessarily over-ruled, as has been supposed;(*y*) but it seems to remain an authority to this extent: that if a person, having 1000*l. three per cent consols*, bequeath 1000*l. three per cent* consols to trustees, in trust to *sell*, &c. the bequest will be specific; the intention being manifest, not conjectural, that from the direction *to sell three per cent* consuls the testator referred to the stock he *then* had; such direction being equivalent to an express gift of the fund. The principle appears to be sound, for it is more reasonable to impute to the testator an intention that his trustees should sell the annuities which he had when his will was made, than that they should, after his death, buy similar annuities for the mere purpose of immediate sale, which they must do if they acted according to the letter of the will.(*z*) This appears to distinguish the case of *Ashton* v. *Ashton* from *Sibly* v. *Perry*, after mentioned.(*a*)

3. We shall now proceed to consider the effect of a testator (who possesses stock or annuities in a particular fund) bequeathing a given sum of money, stock or annuities *in* that fund, without more particularly referring to, or marking the *corpus* of the identical stock which he actually had in that fund at the date of his will. It has been observed that clear intention is necessary to make a legacy specific; but it does not exist in the present instance, for the testatator might only mean to direct his executor to purchase with his general estate so much stock in the fund described: such is the legal effect of the bequest; and that it is not specific, but general,(*b*) will appear from the majority of the following cases:

A. bequeathed to *B.* "5000*l.* in the old annuity stock of the *South Sea* company," and after two or three intervening legacies of stocks of different kinds, he "gave to *C.* 5000*l.* in the old annuity stock of the *South Sea* company." When the testator made his will, and also at his death, he had only 5000*l.* in old *South Sea* annuity stock, which *B.* claimed as legatee. The question was, whether *B.* and *C.* were entitled to 5000*l.* each *South Sea* annuity stock, in which case it was necessary to resort to the general assets, or whether the legacies were specific; for if specific, then there being only one 5000*l. South Sea* annuity stock, the two legatees would be under the necessity of abating *inter se*, and dividing the fund between them. The question having been submitted to the *Master of the Rolls*, he declared that as there was only one 5000*l.* old *South Sea* annuity, one only could pass by the will, which with the interest accrued since the testator's death, was devisible between the two legatees. But that decision being unsatisfactory, the legatees appealed to Lord *Hardwicke*, who reversed the decree, deciding that the legacies were

(*y*) 9 Ves. 181.
(*a*) See *infra*, p. 163.
(*z*) See 2 Ves. sen. 564. 1 Atk. 418.
(*b*) See 1 Atk. 416.

general, and not specific; and he ordered the deficiency to be made good out of the general assets.(*c*)

The case of *Avelyn* v. *Ward*,(*d*) afterwards determined by his Lordship, appears to be not only contrary in principle to the last, but to the authorities after stated. In that case, one of the bequests was, "of 2000*l*. *in* the stock of *South Sea* annuities, to trustees in trust to pay the produce to *A*. for life, and to retain after her death 1000*l*. part of the 2000*l*. in trust for *B*. but to pay the dividends to her during marriage, and after its determination, to tranfer the 1000*l*. to her if living, or if dead, according to her appointment." The testator also gave the remaining 1000*l*. after the death of *A*. to several persons. There was another legacy "of 1200*l*. of the stock called *South sea* annuity stock, in trust for *B*. These several legacies, Lord *Hardwicke* held to be specific, from the mere circumstance (as it is presumed) of the testator having been possessed of more *South sea* annuities when he made his will, than the amount of the legacies given in that fund, whence his Lordship inferred an intention in the testator to bequeath so much of the *identical* stock he then had, and not to impose an obligation upon his executors to purchase the necessary quantity of stock to answer the legacies. To this, it may be answered, that if the circumstance of having stock at the time of the date of the will, be of itself sufficient to make a bequest of similar stock specific, all legacies of stock, whatever their form may be, and however regardless of the fund then actually standing in the testator's name, must be specific; a doctrine in opposition to *Partridge* v. *Partridge*, and the cases before stated, and also to the other authorities which will be afterwards produced.

The present case is much weaker than that of *Ashton* v. *Ashton*,(*e*) referred to in it, for there the trust was to *sell* 6000*l*. *South Sea* annuities, which direction of sale raised an irresistible inference that the testator meant and referred to a sum in the like annuities, which he had when his will was made, though of an inferior amount, and that he could not be so unreasonable as to have intended that his executors should purchase *South Sea* annuities for the mere purpose of selling again; when he, at the date of his will, was possessed of similar annuities, to which the trust could with propriety be applied. With respect to the expression "remaining," used in bequeathing 1000*l*. residue of the 2000*l*. *South Sea* annuities, it is ambiguous, and capable of being referred to annuities of the latter amount, to be purchased by the executor, as well as to those of which the testator was possessed when he made his will, an ambiguity, not removed as in *Sleech* v. *Thorington* (after stated) by the additional words "now standing in my name." Besides, if it be true, as appears from the cases, that courts of equity are always anxious to adopt constructions in favour of general and against specific legacies, to avoid the inconveniences to which the latter are exposed; and that these courts must be satisfied by express words or mainfest intention appearing upon the will, that the testator meant to bequeath all or part of the *identical* stock he possessed when he made such will, before they pronounce *the* legacies to be specific, it seems difficult to

(*c*) *Purse* v. *Snaplin*, Ibid. 415. (*d*) 1 Ves. sen. 424, *et vide* Belt's Suppl. p. 184.
(*e*) Stated *supra*, p. 158.

form any other conclusion upon the present case, than that it is one which, if not now clearly destitute of authority, may be considered to be very doubtful.(*f*)

In *Bronsdon* v. *Winter*,(*g*) another case upon this subject, *A.* bequeathed to *B.* and *C.* "the sum of 2000*l.* capital stock *in* the *South Sea* Company." The testator was possessed of 2000*l. South Sea* stock and no more, at the time of making his will, and in the months of *February* and *March* next afterwards, he sold 1500*l.* part of the 2000*l.* The question was, whether the bequest of the 2000*l. South Sea* stock was to be considered specific or general? And *Verney*, M. R. determined it to be general. Some stress (said he) has been laid upon the words "the sum" of 2000*l.* in the will, as if by them the testator meant that quantity of stock only. But I think no weight is to be laid on that, for if he had said 2000*l. South Sea* stock, that would equally express quantity, and any 2000*l.* stock would answer this legacy; for one stock does not differ from another, though one moveable does differ from another, and it is admitted that if the testator had possessed no stock, the executors must have bought 2000*l.* stock, which shows that any 2000*l.* stock would satisfy this bequest. The fact, as proved, is, that though nothing particular is mentioned in the will to make the legacy of the stock specific, yet the testator, at the time of making his will, had the *precise* quantity of stock. Here seems the stress of this case. But the testator has not used words to make it specific. And if legacies are to be specific or not, from the testator's manner of wording them, and the natural description would have been by words different from what are here used, why should the Court, from the circumstance of the testator having just 2000*l.* stock, determine that he meant that individual stock?

So also in the Bishop of *Peterborough* v. *Mortlock*,(*h*) *G.* master of *Clare Hall, Cambridge*, after giving several pecuniary legacies, bequeathed "to *A.* 100*l.*; to *B.* 100*l.*; to *Storey's* Hospital 3400*l. in* the *three per cents*; the annual dividends of which to be every half year divided betwixt four widows." It appeared that the testator, at the times of making his will and of his death, had 2200*l.* only standing in his name in the *three per cent* annuities; of which 150*l.* belonged to other persons, and that the remaining 2050*l.* were his own. There being a deficiency of assets, the question was, whether the legacy of 3400*l.* in the *three per cents* was to be considered a specific or general legacy? And the Lord *Chancellor* thus expressed himself: "In this case I confess it does not appear to me that there is any question of difficulty. On the face of the will, it is clearly a pecuniary legacy; and if it be to be turned into a specific legacy, it must be upon other circumstances. The form of the bequest is to give 3400*l. in* the *three per cents*. The testator has been definite in applying the *quota* of maintenance to each widow. On the face therefore of the will it is purely pecuniary, and extends only to a *direction* to buy such a sum in such a stock. But it is said, that although this may be so in the words, yet that circumstances may be given in evidence as to the state of the funds in his

(*f*) See Lord *Thurlow's* observations upon this case, 2 Bro. C. C. 113.
(*g*) Ambl. 57. (*h*) 1 Bro. C. C. 565.

possession at the time of making the will; and that if he had, at the time of making his will, more stock than that which he devised, it will be a specific legacy. But this is not the only case in which the Court has been used to make this inference. When I say this, I do not mean to be understood that the Court has laid it down as a positive rule of law, but merely as an interpretation of evidence. In all cases where the legacy is considered as specific, the Court takes for granted that the testator meant that particular fund, although he may be mistaken in the description of it. Now this intention ought to be made out by *strong circumstances*, which certainly do not exist in the present case. I am, therefore, of opinion, that this is a pecuniary legacy; it must consequently abate in proportion with the rest."

The next case upon the present question is *Webster* v. *Hale*.(*i*) The testator bequeathed to his executors in trust the sum of 8000*l.* stock *in* the *five per cent.* Irish fund for the separate use of *B.*; also "the sum of 4000*l.* *in* the *three per cent.* reduced stock, to be paid to her as soon as possible." He further gave to *C.* 1000*l.* *East India* stock, and to *D.* 2000*l.* *three per cent.* reduced stock, to be paid to her as soon as possible; to *E.* the testator also bequeathed 1000*l.* *in* the *four per cent.* stock. It was one of the questions whether these legacies were general or specific? And Sir *William Grant*, M. R. decided, that they were general or pecuniary legacies; observing, that after the cases which had been decided, it was impossible to say that those were not pecuniary legacies.

A case, however, in addition to that of *Avelyn* v. *Ward*,(*k*) must be adverted to, which cannot be reconciled with the authorities before stated. The case is *Jeffreys* v. *Jeffreys*, determined by Sir *John Fortescue*, M. R. and which was to the following effect:

A., at the date of his will, having 2702*l.* 3*s.* bank annuities, and 2000*l.* *East India* stock, bequeathed to his two daughters, *B.* and *C.*, "2702*l.* 3*s.* capital stock *in* the Bank of *England*, and 2000*l.* sterling capital stock in the *English East India* Company, to be equally divided between them." The testator afterwards sold 702*l.* 3*s.* of the bank stock; so that he was possessed at his death of only 2000*l.* bank stock, and 2000*l.* *East India* stock. The question was, whether the legacies were specific? And his Honour decided in the affirmative, from the circumstance of the equality in amount of the stocks bequeathed, with the quantity in possession of the testator when he made his will.(*l*)

It appears from the report of the judgment in the last case, that the *Master of the Rolls* endeavoured to avoid the pressure of such of the several authorities before stated as were cited on the occasion to show that the legacies were general, by assigning different reasons as the grounds of the decrees pronounced in them. It is obvious, however, from the perusal of those cases, and the others before set forth, that the principle upon which the judgments were pronounced, was a want of words referring to the *identical* stock existing at the dates of the wills, or an absence of manifest intention in the testators that they alluded to it, and not the mere circumstance of their

(*i*) 8 Ves. 410. 413. 415. and see 9 Ves. 146.
(*k*) *Ante*, p. 160.
(*l*) 3 Atk. 120.

possessing or not possessing stock at those periods of any particular amount. It is presumed, therefore, that the case of *Jeffreys* v. *Jeffreys* cannot be considered of any authority.

But it is a consequence from what has been said, that if it clearly appear, from reference made to the stock by *additional expression*, that it alone was intended to be the subject of disposition, the legacy will be specific, although the form of bequest be of a sum of money *in* that species of stock, as if the words were, "500*l*. *in my* stock of *three per cent.* consols,(*m*) or 500*l*. which *I now have in* Navy *five per cents.*"

Thus in *Humphreys* v. *Humphreys*,(*n*) the testator being possessed of 5000*l*. stock, bequeathed to *A.* and *B.* as follows: "All the stock which *I have in* the *three per cents*, being about 5000*l*. except 500*l*. which I give to *C.*" Lord *Thurlow* decided, that the stock the testator had was specifically given; so that there was an ademption *pro tanto* in consequence of his having sold 2000*l*. part of it.

The intention, however, of the testator to bequeath specifically, must not be inferred by conjecture, nor upon a *term* which is capable of a *double intendment*, when the form of bequest is general; for a court of equity requires the intention to give specifically, either to be expressed or to be clearly and indisputably manifested from perusal of the whole will. If, then, the legacy be not described as *part* of the *stock* belonging to the testator, but be merely a gift of stock in some one of the public funds, and the executor be *directed* to *transfer* the sum in stock to the legatee; the direction of transfer will not make the legacy specific, which is in other respects general; and for this reason: the testator may have meant either a transfer of the particular stock which he had when his will was made, or that his executor should purchase(*o*) the stock, and transfer it to the legatee. The intention, therefore, to be inferred from the direction of transfer is equivocal, and does not amount to a degree of certainty sufficient to make the legacy specific.

Thus in *Sibley* v. *Perry*,(*p*) *A.* directed his trustee and executor, "within three months after *A.*'s decease, to *transfer* 1000*l*. stock *in* the public funds commonly styled the *three per cents* consolidated, to each of his relations (naming them) if living at his death, and to the issue of such of them as should be then dead." Lord *Eldon* decided, that this legacy was general, upon the *general* principle or rule of construction; although he had no doubt in *private*, that in directing a transfer of stock, the testator meant to give the stock which he had; but that there was no case deciding that a legacy was specific, without something *marking* the specific thing, the very *corpus;* without describing it as standing in the testator's name, or by the expression "my stock."

From the majority of the cases which have been produced, the rule of equity may be considered to be thus settled:

FIRST, that whether a legacy be given *generally* of stocks or annuities, or of stocks or annuities *in* particular funds, without further explanation; the fact of the testator happening to possess stocks or

(*m*) 4 Ves. 750. (*n*) 2 Cox, 184. (*o*) See *Fountaine* v. *Tyler*, *infra*, 165.
(*p*) 7 Ves. 523. 529. and see Lord *Eldon*'s observations in *Deane* v. *Test*, 9 Ves. 152. stated *infra*, p. 168.

annuities in the funds described will not make the bequest specific. And

Secondly, that if a clear intention appear from the will that the testator meant to bequeath the *identical* stock or annuities he was possessed of at the date of it (although he have not expressly declared that intention, nor referred to the stock,) such intention will constitute the bequest specific; an instance of which was before produced, where the executor was directed to sell the stock bequeathed to him in the form of a general legacy.(*q*)

Another instance established to be a clear demonstration of intention to give the *identical* stock or annuities, although the bequest in part was in the form of a general legacy, occurred where a testator, possessing stock or annuities at the date of his will, disposed of them in fractional parts, in giving one of which he adopted *such expressions* of reference, as to raise a clear inference that he intended the *identical* stock or annuities he then possessed.

Accordingly in *Sleech* v. *Thorington*,(*r*) one of the questions arose upon the following bequest. The testatrix gave 2413*l.* 13*s.* to different persons in several parcels and in different proportions, by the name of *South Sea* annuity stock, or *South Sea* annuities, and bequeathed to her coachman the *remaining* 13*l.* 13*s.* *South Sea* stock, "*standing in her name.*" The testatrix died possessed of no more than 2157*l.* 12*s.* 1*d.* *South Sea* annuities. The question was, whether the deficiency should be made up out of the general assets, which depended upon this, whether the legacies were general or specific? And Sir *Thomas Clarke*, M. R. held them to be specific, and therefore not entitled to a contribution from the general personal estate. He said that the *last* bequest, in favour of the coachman was a specific parcel of the stock, part of a larger sum standing in the name of the testator; that none of them were independent, but all connected, from the original bequest of the first portion of the *South Sea* stock to the last, which she computed to be a residue, though erroneously; that the legacies were connected by the last being given by way of remainder, and that this was a specific bequest of such an individual identical thing, as the testatrix apprehended she had.(*s*) He also said, it was material that there was a direction to the executors to *sell*, and convert part of the stock into money; which direction it was impossible the testatrix could have given, if she meant part of the stock should be purchased with her personal estate. That would have been a vain thing, and was laid hold of in *Ashton* v. *Ashton*,(*t*) which was in point. He therefore decreed as before stated.

The last case was followed by *Stafford* v. *Horton*,(*u*) in which *A.* being possessed of 200*l.* *per annum* bank long annuities, and other personal estate, bequeathed to *B.* "100*l.* a year *in* the long annuities;" also to *C.* "50*l.* long annuities," and to *D.* "50*l.* long annuities to be laid out in charities at his discretion." Lord *Thurlow* conceiving (as Mr. *Brown* says) that the legacies were specific, ob-

(*q*) *Ante*, p. 159.
(*r*) 2 Ves. sen. 561. 564. and see *Badrick* v. *Stevens*, 3 Bro. C. C. 431. *et infra.*
(*s*) See *Evans* v. *Trip*, 6 Mad. 91.
(*t*) 1 Forr. 152. 3 P. Will. 383. stated *supra*, p. 159.
(*u*) 1 Bro. C. C. 482. ed. by Belt.

served, that they must be transferred as annuities, and ordered *C.'s* legacy to be paid to him in long annuities, with the payments which had been made upon it subsequently to the year after the death of the testator.

The reason why Lord *Thurlow* conceived that those legacies were specific does not appear. They (according to the cases before stated) are given in the forms of general bequests, and it has been shown that the mere circumstance of a testator having stocks or annuities of the same amounts with those bequeathed will not make the legacies specific. His Lordship, therefore, must have thought, that these legacies were given as fractional parts of the annuities which the testator had at the date of his will, and were consequently specific. But that rests in mere conjecture, for there are *no expressions*, nor directions as in *Sleech* v. *Thorington*, demonstrative of the testator's intention to bequeath in parcels the identical annuities of which he was possessed. The case does not differ from *Simmons* v. *Vallance*,(*x*) and it is conceived that if Lord *Thurlow* delivered the opinion ascribed to him, it cannot be supported, but it may be reasonably doubted whether he ever delivered such an opinion, when the incorrectness of the report and the order pronounced by him in the cause are considered; for if he had conceived the legacies to be specific, it is presumed that he would not have ordered payment to *C.* of what had only been received in respect of his annuity legacy subsequently to one year after the death of the testator, but whatever had accrued due and been paid since the testator's decease.

It will have occured to the reader, that in the preceding cases wherein bequests of stock were decided to be specific, it was considered essential to the specific bequests, that there should be a clear and distinct reference to the corpus of the funds of which the testator was possessed at the *date of his will*. In the case of *Parrott* v. *Worsfold*.(*y*) It was decided by Sir *Thomas Plumer*, that a bequest of "all other stocks or funds which the testator *might be possessed* of or entitled to *at the time of his death*," after a prior specific legacy, was *general:* he observed, "the ordinary criterion of a specific bequest is, that it is liable to ademption; that if the thing bequeathed is once gone, it is lost to the legatee. That criterion fails here; for it would equally pass stock afterwards acquired. Can it be said that a will made now can contain a specific bequest of what may be bought hereafter, of what does not now exist? In a certain sense it may be said that legacies of this kind are specific; as a legacy of the testator's cattle, or all his personal property at his death; but it is not specific unless you can fix on the individual thing given.

But in the recent case of *Fountaine* v. *Tyler*,(*z*) it has been determined, that there may be a specific bequest out of stock of which a testator *is not possessed at the making of his will*, but of which he may be possessed *at his death*. In that case the testator willed, that if he had not so much as 10,000*l*. capital stock in the *three per cents* reduced or consolidated bank annuities, that his (executors) should

(*x*) 4 Bro. C. C. 345, stated *supra*, p. 158.
(*y*) 1 Jac. & Walk. 594. 601.
(*z*) 9 Price, Ex. Rep. 94.

make up the capital sum of 10,000*l.* in the reduced or consolidated bank annuities, or one or both of them, and should hold the same upon trust for all and every the children of his said niece *Frances*, late wife of the said *James Fountaine*, who should be living at the time of testator's decease, to be vested interests in sons at twenty-one and daughters at twenty-one, or days of marriage; he directed that until the legacy should become vested, the executors should apply the dividends for maintenance: and he further directed, that in case there should not be any child who should obtain a vested interest in the said 10,000*l.* it should fall into the residue. The testator had at the time of his death standing in his name 9000*l. three per cent* reduced, and 7000*l. three per cent* consols. The bill was filed by the next friend of the infants (the plaintiffs,) praying that the defendant (the executor) might be ordered to transfer 10,000*l. three per cent* reduced or *three per cent* consols, or that the sum might be made up by one or both of the sums before mentioned, and account for the dividends from the time of the testator's death, and pay thereout allowances for the children's maintenance. The Lord Chief Baron observed, that the words of the will "if I shall not have so much stock, &c." had no reference certainly to the stock he had at that time, but at some future time, and the most appropriate period that could be assigned was the death of the testator; and he considered the legacy in the will as much a specific legacy as if the testator had said, "If I have a particular horse I desire it may be given to the legatee:" the reference to the *corpus* he remarked was clear and direct, and, if that *corpus* should be found among his assets, he gives a portion of it; referring clearly to his possession of the thing at the time of his death. For these reasons the Chief Baron decided, that the legacy was clearly specific, and must go immediately to the legatees from the time of the testator's death. He admitted that if the testator had not had 10,000*l.* in the stocks specified at the time of his death, it would have been in that case a general legacy beyond all doubt. Another question arose in this case, whether the legatees or the executors had the right to elect out of what fund the legacy was to be paid. And the Chief Baron, after noticing the novelty of the point, remarked, that as the executors were to make up the deficiency of the stock either in one or both, as they should think best, they were therefore empowered by the testator to deal with it according to their discretion; and he could not take that discretion away from them unless there were any danger of their abusing it to the prejudice of the infants.

4. The next advance towards a regular specific legacy occurs when annuities or money are given *out* of stock, which the testator was possessed of at the date of his will. Such bequests are not *primâ facie* specific in the ordinary acceptation of the term, but range in the class of legacies of quantity in the *nature* of specific legacies mentioned in the beginning of this chapter. This, then, is a species of legacy between a general and specific bequest. The testator's intention is its basis. It assumes that the testator meant to give a general legacy, with a charge upon a particular fund for its payment, not intending its existence should depend upon the validity or con-

tinuance of such fund,(*a*) for the terms of the bequest are literally complied with by sale of so much of the stock as is required to answer the legacy, so that it cannot with certainty be inferred from the form of bequest that the testator intended to bequeath part of his stock *in specie*, but as a fund generally, first to answer the legacy. Hence it would seem, that if there be nothing expressive of the testator's intention, except what arises from a mere bequest of money or annuities *out* of the testator's stock, the legacy will not be specific, but in the *nature* of a specific legacy before described;(*b*) which rule of construction prevails with respect to bequests of money *out* of debts or securities, as will appear when we treat of such legacies in the seventh section.

In *Kirby* v. *Potter*,(*c*) *A.* bequeathed thus: "my intention and will by the codicil added thereto is to give to *B.* a legacy of 1000*l.* *out* of *my* reduced bank annuities *three per cents* by my executor, within one month after my decease, for his integrity, sobriety, and good behaviour, and deserving in every respect; the question was, whether the bequest was general or specific? And Lord *Alvanley*, M. R. determined, that it was the former, and that *B.* was entitled to 1000*l.* *sterling*, and not to 1000*l.* annuities only; observing, that whenever there is a legacy of a given sum, there must be positive proof that it does not mean sterling money, in order to make it specific: that where the phrase is "1000*l.* *out* of my reduced bank annuities," the sense was, that the executor should raise 1000*l.* by selling so much of that stock;" and the *rule* was, that no legacy should be held specific, unless demonstrably so intended.

In *Deane* v. *Test*,(*d*) (a case of great complexity,) Lord *Eldon* appears to confirm the last decision, so far as regards the *primâ facie* construction to be put upon the words there used. In the case of *Deane* v. *Test*, *A.* bequeathed a variety of legacies of stock, *in* stock, *out* of stock, and *out* of the *dividends* of stock. The first of the bequests was to *B.* for life of "the interest of 4000*l.* stock *in* the *four per cents* consolidated annuities in the Bank of England." And after the death of *B.* he gave "the above 4000*l.* consols annuities which he mentioned before, the fund for paying *B.'s* annuity" to the children of his sister *C.* equally, with benefit of survivorship, among them, if any died under twenty-one. And he in like manner gave to those children "an additional sum of 2000*l.* more, to be paid *out* of the four per cent consolidated annuities *in* the Bank of England," in equal shares, &c. The question was, whether these legacies were specific or general? And Lord *Eldon* determined that they were general, saying, that he was authorized by the case of *Kirby* v. *Potter*, to declare that, upon the words used by this testator, the legacy to be paid *out* of the *four per cent* annuities ought *primâ facie* to be taken as a bequest of a sum of 2000*l.* sterling, with a *direction* out of what fund it was to be discharged.

In the following particulars Lord *Alvanley* seems to have expressed himself too forcibly in the case of *Kirby* v. *Potter*, viz. "that whenever there is a legacy of a given sum, there must be *positive* proof that it does not mean sterling money in order to make it spe-

(*a*) *Sadler* v. *Turner*, 8 Ves. 617, 624, stated *infra*, 171. (*b*) *Ante*, p. 165.
(*c*) 4 Ves. 748. (*d*) 9 Ves. 146, 152.

cific." To this, it is presumed, Lord *Eldon* alluded in those passages of his judgment in *Deane* v. *Test*, where he qualified his approbation of *Kirby* v. *Potter*, by such words as "without carrying it to the *extent* of *Kirby* v. *Potter*;"(*e*) "and I use the authority of *Kirby* v. *Potter* no further than that;"(*f*) for his Lordship thought less than *positive* proof of intention would be sufficient to repel the *primâ facie* construction of the words, *viz.* such an intention appearing upon the whole will, as to satisfy the mind of a judge, that by the words "out of, &c." the testator did not mean to give a money legacy, but the whole or part of his *identical* stock or annuities specifically.(*g*) His Lordship admitted, that by such words the *primâ facie* intention was to give a money legacy: a settled rule of construction to which, so qualified, it was wholesome to adhere, "until driven out by *strong*, *solid*, and *rational* interpretation, put upon *plain inference* drawn from the rest of the will."(*h*) He then observed, that minute criticisms would not vary the *primâ facie* rule of construction: and he expressly guards against "going upon *conjecture* met by conjecture, and *plausible argument* met by plausible argument," to alter the *primâ facie* meaning of the words now under consideration.(*i*)

From the decrees pronounced in the last cases by two such able Judges, the following conclusion may probably be drawn as a guide upon questions of this nature:

That a sum of money bequeathed *out* of particular stock or annuities, is *primâ facie* to be adjudged a money legacy, but liable to be considered a specific bequest of so much of the *identical* stock or annuities which the testator had, when a *clear* intention appears upon other parts of his will, that he so intended; of which intention we shall now proceed to give some instances, first remarking, that there seems to be no difference whether the legacy be of money out of stock, or of a personal annuity *out* of the *dividends* of stock.(*k*)

In *Drinkwater* v. *Falconer*,(*l*) *A.* having 400*l.* new *South Sea* annuities, and 400*l.* *East India* bonds, bequeathed "to his friend and servant *B.* 10*l.* *per annum* for life, to be paid *out* of *my* dividends of 400*l.* in the joint stock of *South Sea* annuities, *now* standing in the Company's books in *my* name, by half yearly payments, and he thereby *charged* his said annuity stock with payment thereof: and I give to *C. my* 400*l.* *East India* stock, and *my* 400*l.* joint stock in *South Sea* new annuities, *(subject to the payment of the said annuity)*, to *D.* &c." And Sir *Thomas Clarke*, M. R. decided, that all those legacies were specific.

In the last case, the testator clearly showed an intention upon the face of his will, specifically to dispose of his identical *East India* stock and *South Sea* annuities, from the manner in which the *whole* were bequeathed; but if the legacy to *B.* had not been explained by the legacy to *D.* it would seem that from the form of the bequest to *B.* it must have been considered general, according to the cases of *Kirby* v. *Potter*, and *Deane* v. *Test*, before stated,(*m*) *viz.* of an annuity for life, the dividends of the stock being merely pointed

(*e*) 9 Ves. 152. (*f*) Ibid. 154.
(*g*) See *Att. General* v. *Grote*, 3 Meriv. 316, stated *infra*. (*h*) 9 Ves. 152.
(*i*) 9 Ves. 154. (*k*) Ibid. 153. (*l*) 2 Ves. sen. 623. (*m*) *Ante*, p. 167.

out as the fund *out* of which it was first to be paid, and in this respect resembling the case of *Mann* v. *Copland*, before also stated.(*n*) Again—

In *Morley* v. *Bird*,(*o*) the testator gave all his money in the stocks, mortgages, debts, goods, chattels, and every thing he died possessed of, to *B.* for ever, *upon condition* that he paid to the four daughters of *C.* "400*l.* *out* of 700*l.* *now* lying in the *three per cent* consolidated;" and the legacy of 400*l.* was held to be specific.

The last decision may be ascribed to the intention to be inferred from the circumstance of the legacy of 400*l.* being given out of the 700*l.* *three per cent* consols, specifically bequeathed to *B.*; the Court probably considering the 400*l.* as so much excepted out of the 700*l.* annuities, *viz.* a division of the identical 700*l.* annuities, between *B.* and the children of *C.* and similar to the case of *Long* v. *Short* before mentioned.(*p*)

5. The instances which have been produced of general legacies *out* of stock or annuities, were those where the legacies were *expressly* given out of such stock or annuities. But, when they are not so expressly given, they will be equally general, although stock or annuities be mentioned or referred to, as the *then* or the *supposed* then situation of the money bequeathed, it being apparent that the thing given is not the identical stock or annuities, but the *money*; and that the circumstance of the money being or continuing in the stock or annuities, is no ingredient in the essence of the bequest, nor a condition upon which it was intended to depend.(*q*) As proof of this—

In *Raymond* v. *Brodbelt*,(*r*) *A.* late of *Jamaica*, reciting in his will, that he had remitted several sums of *money* to *England*, which he had directed to be invested in government funds, and which *he believed* had been laid out either in three per cent bank annuities, or in three per cent consols; and also that it was his intention that the provisions for his younger children should be by *equal portions of such bank annuities* in which the said monies had *then* been invested; if therefore the sums he had *then* invested or *might* do before his death, should not be sufficient for the purposes therein mentioned, he authorized his executors to invest a sufficient part of his estate in the purchase of so much more bank annuities of the same kind as he had then already purchased, as would be sufficient to answer the purposes in his will, and after mentioned. *A.* then bequeathed to his executors 10,000*l.* *current money* of *Jamaica*, *invested*, or to *be invested*, by them in the public funds, pursuant to the same power, upon trust to receive the dividends, and apply a sufficient part of them for the maintenance of his daughter *B.* until marriage, or her age of twenty-one, and from and after that age or marriage, upon trust, to receive the interest and dividends of the *said* 10,000*l.* and pay the same to *B's* separate use. And after settling the 10,000*l.* and interest upon the children of *B.* and, in the event of none, upon her husband, being the survivor, he directed that if his daughter died under age and unmarried, the 10,000*l.* was to become

(*n*) *Ante*, p. 153. 2 Mad. 223.
(*o*) 3 Ves. 628, 631.
(*p*) *Ante*, p. 152. 1 P. Will. 403.
(*q*) See *infra*, sect. 7. pl. 2. p. 179.
(*r*) 5 Ves. 199.

part of his residuary estate. The testator also bequeathed to his executors another *sum of* 10,000*l.* of *current money* of *Jamaica, invested* in the public funds pursuant to the said power, upon the same trusts, in favour of his daughter *C.* her children and husband, if she left one, as were declared in favour of his daughter *B.;* with a similar direction that the last mentioned 10,000*l.* should fall into the residue if *C.* died under age and unmarried; which residue he gave to his son *D.* and appointed him executor. Prior to the date of the will, the testator had made several remittances to *England,* to be laid out in bank three per cent annuities, which were accordingly invested. He also after his will, made other remittances, which were placed out upon government securities, and at his death there were standing in his name 15,500*l. three per cent* consols, and 795*l. four per cents.* Upon the bill of the legatees and their husbands against *D.* praying the transfer of a moiety of the 15,500*l. three per cent* consols and a moiety of the 795*l. four per cents* to the accountant general, in trust, for *B.* during her life, and at her death, upon the other trusts of the will, and that *D.* might lay out so much of the testator's personal estate as, with the value of a moiety of the stock, *according to the prices which the same bore at the time of his death,* would be equal to the sum of 10,000*l. Jamaica* currency, in the purchase of three per cent consols, upon the same trusts, and praying similar relief on behalf of *C.* and her husband; it was insisted by *D.* that, according to the true construction of the will, the amount of the current money which was invested in 15,500*l.* three per cent consols and 795*l.* bank four per cents, was to be considered as applied in part payment of the legacies, and therefore that the stock ought to be received in part satisfaction of them, as and for the sum of 16,377*l.* 7*s.* 6*d. Jamaica* currency, the amount of the current money, which was *laid out in the purchase of such stock.* But Lord *Rosslyn* said there was nothing fluctuating in either legacy; and that each must be 10,000*l.* currency; that the legatees could have neither more nor less. "Suppose (continued his Lordship) the investments (the value of the stock purchased) had exceeded 20,000*l.* currency, the legacies would have been limited. If the stock had risen to *par,* the legatees could not have more than 10,000*l.* currency. If the legacies were specific, the value of the stock of necessity must be ascertained by the value at the death of the testator. But there is nothing specific in them. They are legacies of 10,000*l.* currency each. The legatees never can receive more, nor I apprehend less. The Master was directed to inquire what sum of money would have been necessary to have invested in the *three per cents,* to have paid 10,000*l.* currency to each of the legatees at the time of the testator's death, and to compute what was due to the plaintiffs upon their legacies with interest, according to such currency, to the time the whole investment was made, upon such sum as the Master should find would have been necessary for the investment."

It is obvious from the whole will in the last case, that the testator meant his younger children money legacies of 10,000*l.* each, *Jamaica* currency, which were to be invested in the *English* funds. The bequests were of money, not of stocks, as also appeared from

the directions, that if the stock purchased with the testator's own remittances during life, should not be sufficient to answer the legacies, his executors should *purchase* the deficit of stock with his general personal estate. The intention, therefore, of the testator being clear, to give to such legatee 10,000*l.* *worth* of stock, according to the currency of *Jamaica*, his afterwards mentioning the stock in which the money was, or was supposed then to have been invested, was not with the intent of making those legacies depend upon the contingency of his having stock at his death sufficient to answer them, but merely that the stock which had been purchased by him whilst living, should be the *primary* fund for their payment, so as to give these particular legatees a *lien* upon it in preference to other general legacies; in which sense alone those legacies were specific, according to the proposition laid down by Lord *Rosslyn* in his judgment, "that there is a *general* legacy, and attended with the qualifications of a specific legacy, yet with an *appropriation* upon *part* of the property, and that is the case here."

Similar to the last case, is *Lambert* v. *Lambert*,(*s*) determined by Sir *William Grant*, in which *A.* bequeathed as follows: "to *B.* the *sum* of 12,000*l.* of my funded property, to be *transferred*,(*t*) in the name, or employed as he shall deem most beneficial for his interest, by my executor, &c. To *C.* I also bequeath the sum of 12,000*l.* to be enjoyed in every respect as in the case of *B.* &c." And his Honour decided that the legatees were entitled to the *worth* of 12,000*l.* each, *out* of this property, or to have it divided amongst them, if not sufficient to pay those sums, but if there were a surplus, then that it belonged to the general estate of the testator.

SECT. VI. COLONIAL PROPERTY.

The like principle applies to cases where a person, having property in *England* and *India*, gives pecuniary legacies, but postponing their payment until his *India* property should be remitted to *England*, and realized or invested in the funds; such postponement will not make the legacies specific, so as to depend upon the circumstance of the testator having at his death property in *India* to transmit for realization or investment; for the intention was only to consult the convenience of his estate, and not that the legacies should fail if he left no funds in *India* for remittance; as they would do, if specific, (*i. e.*) consisting of so much of the testator's property in *India to be* remitted and realized or invested. These points will appear from *Raymond* v. *Brodbelt* before stated, and the following case:

In *Sadler* v. *Turner*,(*u*) *A.* in disposing of his property in the *East Indies*, gave several legacies, among which were two in the following terms: "I give to *A.* and *B.* (married women) 1000*l.* each, for their sole use and benefit, which legacies I direct to be *paid* so soon as my property in *India shall* be realized in *England*." And Sir *William Grant* was of opinion that those legacies were general, there being nothing to make them specific out of the estate in *India*,

(*s*) 11 Ves. 607. and see 2 Bro. C. C. 18. 21. 1 Cox, 204. 4 Ves. 159.
(*t*) For the effect of a direction to *transfer*, see *Sibley* v. *Perry*, *supra*, p. 163.
(*u*) 8 Ves. 617. 624.

and dependant upon their being sufficient property in that country at the testator's death.

It is observable, that the legacies are simply of sums of money. There are no words nor plain intention to give to the legatees any particular parts of the *India* property in preference to other portions of it. The testator meant no more in the direction of payment than to consult the convenience of his estate. The Court, therefore, justly observed, that in the absence of any thing to make the legacies specific, they must be general, and entitle the legatees to satisfaction, although all the property in *India* belonging to the testator should have been transmitted to *England* during his life.

And although a testator, having property in *England* and *India*, give legacies to the persons resident in each place, with a direction that they should be paid out of the assets in the *respective* countries yet such a direction will not constitute the legacies specific; *i. e.* confine each class of legatees to the funds in the country where they reside; but the whole of the assets, after payment of debts, whether in *England* or *India*, will be liable to their demand: the direction of payment by the testator being nothing more than what the law would have done if he had been silent on the subject. Such were the opinion and decree of Lord *Kenyon*, M. R. in *Kirkpatrick* v. *Kirkpatrick* (*x*).

But legacies of *India* property will be specific in all cases, where such legacies would be so, if of English personal estate; and consequently, the same observations apply to them, as are made in regard to English legacies in this chapter under its several sections. It shall therefore suffice to produce in this place but one instance of specific legacies of property in the *West Indies*.

In *Nisbett* v. *Murray*,(*y*) *A.* after bequeathing three specific dispositions of lands and slaves in the Island of *Jamaica*, gave the residue of his real and personal estates *in* the *said* island, to trustees to sell, and remit and lodge the proceeds and all other monies belonging to his estate in safety in *England;* which proceeds and monies he bequeathed in sums currency to several persons. It was determined, that the *Jamaica* property was specifically bequeathed. And according to *Page* v. *Leapingwell*,(*z*) before stated,)(*a*) the several legatees would be entitled to the whole fund, in exclusion of other legatees, who could only resort to the testator's assets in *England*.

Having considered what forms of bequest will and will not have the effect of passing to the legatee, the specific stock or annuities which the testator was possessed of at the date of his will, the subject next proposed to be treated upon, is—

Sect. VII. What will amount to Specific Legacies of *Debts*, by Simple Contract, or secured upon Mortgages, Bonds, &c.

The distinctions which have been made in the last section equally apply to the present subject, and especially the difference between a regularly specific legacy of a debt itself, and a bequest of a sum of money with reference only to the debt, for payment of the lega-

(*x*) Cited, 4 Ves. 158. and see 5 Ves. 156.
(*y*) 5 Ves. 150. (*z*) 18 Ves. 463. (*a*) *Ante*, p. 154.

cy; this being a bequest *in nature* of a specific legacy, of which instances have been before given.(*b*) The distinction between the two kinds of specific legacies is thus expressed by Sir *William Grant*: "The same legacies may be specific in one sense, and pecuniary in another; specific, as given out of a particular fund, and not out of the estate at large; pecuniary, as consisting only of definite sums of money, and *not amounting* to *a gift* of the *fund itself*, or any aliquot part of it."(*c*) The intention of testators expressed or inferred from their wills, is the only requisite in these cases; so that whether a bequest is to be adjudged a specific disposition of an *identical* debt, or the debt is to be considered merely as the fund out of which it is to be first satisfied, and the legacy to be paid at all events, although such fund fail, is a question resolving itself into the testator's intention. When the intention is not expressly declared, but to be inferred from the context of the will, the inference must, as we have seen,(*d*) be found upon a strong, solid and rational interpretation put upon, and a plain inference drawn from such will. Minute criticisms, grounded upon consequences drawn from minor circumstances or conjectures, or plausible arguments, will not have the effect of making the bequest specific, when the form in which the legacy is given is general.(*e*) These observations are not only supported by the authorities stated in the last section, but by those which follow. And,

1. What will be a specific bequest of a debt or security.

Upon this subject the following rule of construction will, it is presumed, be found correct; that when the gift of the legacy is so connected with the debt or security, as that the gift of the legacy and of the debt or security are the same, the intention to give nothing more than the identical debt or money due on the security is apparent, and consequently, the legacy will be specific. First, then, if I bequeath to *B.* "the money now owing to me from *A.*," or "in the hands of *A.*;"(*f*) or, secondly, if *A.* be indebted to me on bond, and I bequeath to *B.* "the money due to me on the bond of *A.*," or "the *interest* arising from or upon the bond of *A.* to *B.* for life, and to *C.* the *principal* of the said bond;" or, thirdly, if I bequeath to *B.* "*my* mortgage," or "my *East India* bonds or bond,"(*g*) or "my note owing from *D.*," or "*my* note in the hands of *E.*;"(*h*) these several bequests will be specific, because in the first class nothing is given distinct from the debt owing by *A.*, nor in the second, from the *identical* money and interest secured on the bond of *A.*; and in the third, the securities themselves are specifically given.

In *Ashburner* v. *M'Guire*,(*i*) the testator bequeathed to his sister *B.* "the interest arising from her husband *C.'s* bond, to him for principal, 3500*l.* sterling," for life, to her separate use, "amounting to 175*l.* sterling *per annum*. Item, he bequeathed the *principal* of the *said* bond on the decease of *B.* to her four daughters, &c. to be equally divided amongst them." And Lord *Thurlow*, after great consideration, determined, that the bond was specifically given; that

(*b*) *Ante*, p. 166. (*c*) 3 Ves. & Bea. 5. (*d*) *Ante*, p. 168.
(*e*) 7 Ves. 523. 529.
(*f*) See *ante*, sect. 4. p. 155. and *Ellis* v. *Walker*, Ambl. 309.
(*g*) 2 Ves. sen. 563. (*h*) Ibid. 623. (*i*) 2 Bro. C. C. 108.

it was *legatum debiti;* his Lordship observing, that when the testator made his will, 3500*l.* were due to him from *C.* by bond; that he meant to relinquish it for the benefit of the family, not by way of release to the husband, but by way of settlement; and that *this* debt, whether it turned out well or ill, should go to the family; the interest to his sister for life, the principal among her daughters; and consequently the legacy must be considered specific.

Upon the authority of the last case, Lord *Alvanley*, M. R. decided that of *Chaworth* v. *Beech.*(*k*) There *A.* by codicil bequeathed to *B.* in the following manner: "Whereas I am entitled to 8000*l.* vested in the bank of, &c. for which sum, payable with interest at *three per cent* one month after sight at *N.*, I have the promissory note of the said bankers, now I give and bequeath to my friend *B.* who lives with me, the before-mentioned sum of 8000*l.*" Before the codicil was made, *A.* thus indorsed the note: "I give *this* note to *B.* which is along with me, for the love and regard I have for her." Upon a question whether this bequest was general or specific, it was dertermined that the legacy was specific, in consequence of the *indorsement* made upon the note; his Honour observing, "that when he read that and the codicil, the latter was nothing more than a recognition of the indorsement (testamentary) made upon the note; and with all the anxiety he felt not to hold a legacy specific, unless it were demonstrably so, it was impossible not to say that this testator meant to give the *note itself*, with all the interest due upon it. But if there had been no indorsement on the note, then even upon the *will itself*, and the case of *Ashburner* v. *M'Guire*, (which is the true rule upon the point,) he must hold that the legacy was *that note*, and nothing else."

The last case was immediately followed by *Innes* v. *Johnson*,(*l*) which was to the following effect: *A.* bequeathed to his sister *C.* the *interest* of 300*l.* upon bond for life, and after her death, he gave to her daughter *D.* the interest then due upon the said *bond*, together with the *principal*, to be at her disposal at twenty-one. The testator was possessed of two bonds; one for securing 300*l.* and the other 200*l.* And Lord *Alvanley* was of opinion, that the gift was a specific legacy of the bond for 300*l.*; the words "said bond" fixing the bequest to that identical security which the testator was possessed of at the date of his will. Again,

In *Pitt* v. *Camelford*,(*m*) the form of bequest was thus: *A.* by codicil, *reciting* that he was possessed of about 7000*l.* *navy bills*, gave the *same* to his executor, to receive the interest, and to lay the same out in the funds to such uses as his daughter *B.* should appoint. Lord *Thurlow* said, that if ever there was a specific legacy, this was so, and decreed accordingly.

So also in *Stanley* v. *Potter*,(*n*) *A.* after reciting in his will that he had lent *B.* 2000*l.* who had executed to him a heritable bond, charging certain lands, &c. with the payment of it and interest, *or* an *annual* rent of 100*l.* for the same, gave and devised that all the *said* annual *rent*, of 100*l.* sterling, or such annual rent, less or more, as by the law for the time being should correspond to the said prin-

(*k*) 4 Ves. 555.
(*l*) 4 Ves. 568.
(*m*) 3 Bro. C. C. 160.
(*n*) 2 Cox, 180. 4 Ves. 559.

cipal sum of 2000*l.* and all the said lands, &c. in security to trustees for ninety-nine years, in case his daughter *B.* so long lived, upon trust to *pay* to her, or her appointee, for life, an annuity of 60*l.*; and after the end of the term, and in the meantime subject thereto to the use of *C.* for life, &c. The testator directed his trustees, if the debt should be discharged, to invest it in the purchase of lands to be settled upon the trust and uses before mentioned and referred to as to the yearly rent, and to place the 2000*l.* till such purchase could be made, on government securities, and pay the dividends to the persons who would have been entitled to the rents. The testator received the debt himself, and delivered up all securities; and the question was, whether the bequest was specific, and consequently adeemed. And Lord *Thurlow* decided in the affirmative, referring to the case of *Ashburner* v. *M'Guire.*

The cases which have been cited are instances of bequests of the securities with the money due upon them. They are strict forms of specific legacies, and the intention to bequeath specifically could not be more clearly expressed.

So also in *Gillaume* v. *Adderly*,(*o*) the testator bequeathed "the sum of 3348*l.* 3*s.* 4*d.* sterling," to his father and mother for their joint lives, and during the life of the survivor, "which said sum" he expressed "to be in two bills drawn by the presidency of *Fort William, Bengal;* one for the sum of 1125*l.*, the other for 2223*l.* 3*s.* 4*d.*, being the account of money paid into the treasury of *Fort William*, on account of the investment of 1782 and 3, which bills are now laying for acceptance at the *India* house, in *London.*" Lord *Eldon* said, there was no doubt that the legacy was specific; for, continued his Lordship, the testator, taking notice that the bills, in which that legacy was invested, *then lay for acceptance* at the *India* house, and adverted to the fact that the *identical* sum would be received, it was impossible to say that it was not *legatum debiti.*

It appears impossible to reconcile the case of *Coleman* v. *Coleman*(*p*) (a decision of Lord *Rosslyn*,) with the authorities before stated.

In that case, *A. reciting* in his will that he was possessed of a bill of exchange drawn in his favour upon the *East India* Company, and accepted by their order, and entered in their books for the sum of 1500*l.*, bearing interest at *three per cent*, gave the *interest of the bill* to his wife for life, and directed that after her death the *same* should be sold, and the money equally divided among several nephews and nieces, with survivorship among them if any died before his wife. And Lord *Rosslyn* determined that this was not a specific legacy.

That decree was founded upon an inference, which his Lordship drew from the manner in which the bill of exchange was settled by the will, *viz.* that the testator did not mean so to give it, that receipt by him of its amount, during his life, should disappoint the bequest. But this inferential argument was equally applicable to the case of *Pitt* v. *Camelford*, before stated,(*q*) and yet Lord *Thurlow* said, that if ever there was a specific legacy, that was so; an observation which may be transferred to the present case. Besides, Lord *Rosslyn's* inference was drawn in opposition to the express form of the bequest,

(*o*) 15 Ves. 384. 389. (*p*) 2 Ves. jun. 639. (*q*) See preceding page.

which was strictly specific; and if the testator's language be to have any effect, then it appears from his own expressions that his intention was to give the bill specifically, an intention which being so plainly declared ought not (as it is presumed) to have been controlled by mere inference drawn from the settlement of the property. Under these circumstances it is conceived that *Coleman* v. *Coleman* ought to be considered at the utmost but of very doubtful authority.(*r*)

In the next case, the objection raised to the legacy's being specific was its being a bequest of the *money* to be received on the security; to which Sir *William Grant* answered, that "such was the case of every bequest of a debt." It is not, therefore, necessary to render the legacy of a debt specific that the security itself should be given, but it is sufficient if it clearly appear that the money due upon such security was intended to be the sole subject of the gift.

Thus in *Fryer* v. *Morris*,(*s*) the form of the bequest was as follows: "I bequeath to *B.* all such sum and sums of money as my executors *may*, after my death, *receive on* the interest note of 400*l.* given to me by Messrs. *Cross & Co.*, bankrupts, *Bath*, either as a dividend under their commission in part thereof, or which they, my executors, may receive from the representatives of the late *J. C.* or otherwise in respect of such note, in trust for all the children of *D.* who shall attain the age of twenty-one, equally." Sir *William Grant* determined that this amounted to a specific legacy of the money due upon the note.

When the question is, whether a testator intended *specifically* to dispose of *part* of a debt owing to him, the same observations apply, as when the point for decision is, whether he intended specifically to bequeath the whole of a debt due to him. He must either *express* that the legacy is part of the debt, or he must use *language* sufficiently clear *to show*, that the subject bequeathed was meant to be parcel of the identical sum due to him. With respect to the first of these remarks,—

A. bequeathed in the following manner: "to my grand-daughter *B.* the sum of 40*l.* *being part* of a debt due and owing to me for rent from *C.*, she allowing what charges shall be expended in getting the same. Item, I bequeath to my grandsons, *D.* and *E.* the *rest* and residue of what is due and owing to me from the said *C.*, which is about 40*l.* more, in equal shares, and they allowing charges as aforesaid." These were held to be specific bequests of the debt due from *C.*(*t*)

And in relation to the second remark, the case of *Ellis* v. *Walker*,(*u*) proves, that unless the testator had clearly shown that he intended to bequeath the identical sum due to him upon the last settlement of partnership accounts by the explanatory words "if I do not draw it out of trade," the form of bequest to *B.* of 2000*l.*

(*r*) And see *Bronsdon* v. *Winter*, Ambl. 57. (*s*) 9 Ves. 360.

(*t*) *Ford* v. *Fleming*, 1 Eq. Ca. Abr. 302, pl. 3. not so correctly reported in 2 P. Will. 469. and see *Rider* v. *Wager*, 2 P. Will. 329.

(*u*) Ambl. 309. and stated *supra*, p. 155. As to what expression, short of plain declaration will be sufficient to make the legacy specific, see 2 Ves. sen. 561. 564. Forrest. 152. 2 Bro. C. C. 18. 3 Bro. C. C. 431.

"which appeared to be due to the testator on the last settlement in trust, &c." would not have been a sufficiently clear manifestation of an intent to make the legacy depend upon the existence of such a fund, as well from the nature of the fund, as the manner in which the legacy was given, *viz.* of a sum of money; for the clause that immediately followed the gift was merely descriptive of the property out of which the legacy was to be paid, (*i. e.*) what, if any thing *might* be due to the testator in respect to his share of the partnership stock, a fund quite contingent, as depending upon the result of the partnership accounts, and not a substantive independent bequest of such share itself. Such was the reasoning of Lord *Hardwicke*, and who expressed his opinion, that the legacy of 2000*l.* would have been general, except from the marked words, "if I do not draw it out in trade."

But the case of *Philips* v. *Carey*(*x*) must be noticed, which decided that a bequest was specific, upon intention inferred from words not affording that plain unequivocal evidence of intent, which, as we have seen,(*y*) is required to render a legacy specific which *in form* is general.

In that case the testator gave a legacy of 1000*l.* to *B.*, payable at the age of twenty-one, or marriage, to be *retained in the hands of A.* (who had money of the testator in his hands as his banker.) And it was held by the *Master of the Rolls*, that this legacy, if pecuniary, would only carry interest from the time of payment; but that by the manner of bequeathing it, the 1000*l.* was severed from the rest of the estate, and especially appropriated for the benefit of the legatee, so that it, being specific, should immediately carry interest.

The reader should be apprised that the last case was said by Lord *Thurlow*, in *Ashburner* v. *M'Guire*,(*z*) to be nonsense, and to have been frequently denied; it was, however, referred to with approbation, by Lord *Hardwicke* in *Heath* v. *Perry*,(*a*) who thus notices it: "It was a sum of 1000*l.*, and part of it out of a specific debt due to the testator; therefore, this was a specific legacy; and whether the whole or part of a debt due to the estate be given as a legacy, it is equally specific, and therefore a distinct tree and distinct fruit." When two such great Judges, so diametrically differ, reference must be had to principle and authority, to discover which of the two is right. It is settled, as before observed,(*b*) that strong, solid, and rational interpretation put upon, and plain inference drawn from, the will are necessary to repel the *primâ facie* construction of a bequest being general when given in that form. Lord *Eldon* has decided, that inference arising upon *equivocal* expressions is insufficient for that purpose.(*c*) Then, to apply this test to the present case—the balance in the hands of the testator's banker was fluctuating; it was not likely, therefore, that he intended to make the legacy depend upon that contingency.(*d*) In addition to this consideration, he bequeathed to *B.* a sum of 1000*l.* in its form general, with a direction

(*x*) Stated in the argument of the case of *Lawson* v. *Stitch*, 1 Atk. 507.
(*y*) *Ante*, p. 168.
(*z*) 2 Bro. C. C. 113.
(*a*) 3 Atk. 103.
(*b*) *Ante*, p. 168.
(*c*) *Sibley* v. *Perry*, 7 Ves. 529. and see his Lordship's observations, 9 Ves. 152.
(*d*) Ambl. 309.

to *A.*, his banker, to *retain* the sum in his hands. By that direction, he might mean no more than that *A.* should preserve a sufficient fund in his possession, to answer the legacy when *B.* should marry, or attain the age of twenty-one, referring to the money in *A.'s* hands as the primary fund out of which the legacy should be paid, and not as an original specific disposition of any part of it; or he might mean (though less probably) to give of his specific money in *A.'s* hands to the amount of 1000*l.*, with orders to *retain* that sum till it became payable. The intention, then, being *equivocal*, and the interpretation or inference not coming up to the rule before stated, it is presumed that the sentence passed upon this case by Lord *Thurlow*, is just, and that if a similar one were to occur, the decision in *Philips* v. *Carey* would not be followed.

2. Having produced various instances of forms of bequests which have been adjudged to be specific, we shall next proceed to the consideration of those forms of dispositions which have been held insufficient to create specific bequests of the debts or securities to which they alluded. Questions upon this subject, as on those which have been previously discussed, depend upon the testator's intention; that being the test by which they are to be tried and determined. A court of equity leans to the consideration, that all bequests are general: it therefore requires expressions actually bequeathing the *identical* debt, (examples of which have been given,) or such a *reference* to it appearing upon a strong, solid, and rational interpretation of the will, as to raise a plain inference that the debt was the exclusive subject intended to be given by the testator to the legatee; for the bequest of a sum of money, with ever so plain a reference to the amount of a debt or fund out of which it is given, is very different from a gift of the fund itself, with all the chances of fluctuation in its amount;(*e*) so that when a legacy of a debt is in its form general, and it is endeavoured, from the context of the will, to construe such bequest specific, it can only be accomplished by such strong, solid, and rational interpretation to be put upon, and plain inference to be drawn from the will, as have been before mentioned.(*f*) Mere *private* opinion or *conjecture* will be insufficient for the purpose. In considering the cases in confirmation of the above remarks, we shall commence with an instance where the security belonging to the testator was neither given nor referred to, but the bequest was merely of securities of a similar description:

In *Sleech* v. *Thorington*,(*g*) *A.* bequeathed as follows: "I give and bequeath unto *B.* 400*l.* *East India* bonds, on trust to pay the interest thereof from time to time to my niece *C.* until her age of twenty-one, or marriage; and afterwards to pay the said 400*l.* *East India* bonds to her." Sir *Thomas Clarke*, M. R. decided, that this form of bequest was not specific, but of *quantity*, and to be made good out of the personal estate of *A.*

The instance just given has none of the essentials of a specific legacy. There is no reference to any *East India* bonds in *A.'s* possession, nor are there any expressions or inference from the will, that *A.* intended to bequeath any such securities specifically. The le-

(*e*) 3 Ves. & Bea. 5. Ambl. 309.
(*f*) *Ante*, p. 168.
(*g*) 2 Ves. sen. 560. 563.

gacy is of *East India* bonds generally; a bequest which the executor can literally satisfy by the purchase of any bonds of that description. This, then, seems to be the first step towards rendering a legacy specific.

The next advance towards the specific legacy of a debt or security, is where the form of bequest being general, allusion is made to the debt or security; but in such a manner as to render it *equivocal* whether the debt or security was or was not intended to be specifically bequeathed. Under such circumstances, the *primâ facie* construction of the bequest being general, cannot, as before observed,(*h*) be repelled by inference arising from such a reference or allusion to the particular fund. This may happen, first, when a *sum* of money is distinctly bequeathed, and a debt or security is previously or subsequently mentioned, but without any declaration or plain inference appearing that such fund was itself the *identical* fund *solely* intended for the legatee. Or, secondly, this may happen when the legacy is given in the form of a general, but out of or directed to be paid out of a particular debt or security. In these instances the legacies are general, because the bequests being distinctly made in that form, *viz.* of a sum of money, the prior or subsequent description of a particular fund, or the gift of the sum out of it, raises no higher inference than this: that the testator might intend to bequeath the debt or security specifically, or he might only mean to point to that fund as the primary one out of which the legacy should be paid; so that there is wanting that plain and certain inference of intention arising from a strong, solid, and rational interpretation of the will, which is necessary to repel the *primâ facie* construction that the legacy is general.

Of the *first* proposition, the opinion of Lord *Hardwicke*, in *Ellis* v. *Walker*,(*i*) is confirmatory.

So also in *Gillaume* v. *Adderley*,(*k*) *A.* bequeathed to *Elizabeth*, his natural daughter, then in *England*, for her education, the *sum* of 5000*l. sterling*, or 50,000 current rupees, to be paid at twenty-one, or upon her marriage, if with the consent of such of his trustees as might be then in *England;* but in case his daughter were in *Jamaica* when she married, he directed the *said sum* of 5000*l. sterling* to be paid to her at twenty-one, if then in *Jamaica*, or on her marriage there. And he further directed, that the *said sum* of 5000*l. sterling*, or 50,000 current rupees, which he expressed to be "now vested in the Company's bonds," should be remitted to *England* as opportunity offered; and that the *said sum* of 5000*l. sterling* should be vested in the bank, or upon government security, in trust for his said daughter, and the interest applied for her support and education during minority, until she should be entitled to the *said sum* of 5000*l. sterling*, or 50,000 current rupees, in manner aforesaid; but that if she died before twenty-one, without having married in *Jamaica*, or if she married in *Europe* without consent of the trustees as aforesaid, he bequeathed the *aforesaid sum* of 5000*l. sterling*, or 50,000 current rupees, and accumulated interest, equally between his brother

(*h*) *Ante*, p. 169. (*i*) Ambl. 309. stated *supra*, p. 155.
(*k*) 15 Ves. 385. 389. and see the case of the Earl of *Thomond* v. The Earl of *Suffolk*, 1 P. Will. 462.

and sister *B.* and *C.* The question was, whether this legacy was specific or general? And Lord *Eldon* expressed his opinion, that it was of the latter kind; observing, that it was *originally* a legacy of money, 5000*l.* or 50,000 current rupees considered as of the same value, and that the bequest was no more than of a sum of money, pointing out a particular mode of payment by a fund provided in the first instance.

Yet, as the reader will observe, there is no gift of the last legacy *out* of any particular *India* bonds of the testator at the date of his will, nor a direction for its payment out of any such securities. The principle of the decision appears to be, that the legacy being originally given as general, the mere subsequent notice that the sum was then vested in *India* bonds was insufficient, for the reasons before mentioned, to change the nature of the bequest, and make it specific; and that although it was not expressed that the legacy should be paid *out* of the bonds in the possession of the testator, yet his mentioning them was sufficient evidence of his intention to make them the primary fund for paying such legacy.(*l*)

To the last determination may be added the case of *Le Grice* v. *Finch*;(*m*) in which *A.* reciting, "that it was the wish and desire of her mother and herself that *the* 500*l. they had then out upon mortgage*, should be given to *B.* and her family in manner thereinafter mentioned," gave to her executors, immediately after her mother's death, *the said* 500*l.* with all interest due thereon, upon trust for *B.* &c. as therein mentioned. This money having been called in by the testatrix, the question was, whether the bequest of it was not specific, and consequently adeemed? And Sir *William Grant* held the bequest to be general; it being made of a sum of money, and the security being only mentioned as descriptive of the *then* situation of the money: money, not the security, being the subject of gift. The principle is the same as that of the decree in *Gillaume* v. *Adderley*. His Honour thus expressed himself: "The essential characteristic of the legacy is, that it consists of a sum in which the testatrix admits that her mother and herself had some sort of joint interest, and which they were both desirous of giving to *B.* This characteristic was not at all dependant on the particular security on which the money might be placed. The testatrix *considers* the circumstance of its being at that time out on mortgage as merely *accidental*. She *speaks* of the 500*l.* we have *now* out upon mortgage. That is descriptive of the present situation of the money. The next day it might not be out upon mortgage, but it would still be *the* 500*l.* in which the mother and the daughter had a joint interest, and which at the time of the will they had out upon mortgage. The thing *given* is *not* the mortgage, but the money. It is the *said sum of* 500*l.* that she gives to her executors. What is the *said sum*? That sum of 500*l.* which belonged to her mother, and which at a given time was out upon mortgage. Whether it remained out upon mortgage at the time of the testator's death, appears to me a matter of indifference. That circumstance is no ingredient in the gift, either by way of condition or of inherent description. I am therefore of opinion, that the legacy is due."

(*l*) See *ante*, sect. 5. p. 169. and 1 Meriv. 178. (*m*) 3 Meriv. 50.

It is observable, that the two last cases differ from *Ashburner* v. *M'Guire*, and the other authorities of that class, and before stated, in which the forms of bequest were not general, with a subsequent allusion to, or specification of securities, but primary gifts of the securities themselves.(*n*)

As to the *second* proposition, that although a legacy be bequeathed *out* of a debt, it will not, generally speaking, be a regular specific bequest of the debt itself, whether the bequest be of a sum of money, and therefore, in terms general, or whether it appear to have been given as a general legacy, upon clear inference arising from the *whole will;* which was the principle of the cases of *Savile* v. *Blacket*,(*o*) and *Mann* v. *Copland*,(*p*) before stated.(*q*) Such legacies are in one sense only specific, that, against all other general legatees they have a precedency of payment out of the debt or security,(*r*) but in another sense the legacies are general, since if the debt be not in existence at the testator's death, or if it be insufficient to pay the legacies, the legatees will be entitled to satisfaction out of the general estate of the testator. A few cases will illustrate these observations:

In *Roberts* v. *Pocock*,(*s*) *A.* bequeathed to his nieces *B.* and *C.* the sum of 4000*l.* with benefit of survivorship, if either died under twenty-one, and if both died under that age, he directed the whole of the said 4000*l.* to fall into his residuary estate. He then gave to *D.* the sum of 500*l.* at twenty-one, with the like direction as to its falling into the residue, if she died under age. He also bequeathed to *E.* the sum of 500*l.* for the trouble he heretofore had in the management of his, (the testator's) affairs, and would have in the execution of the trusts of his will. The will then proceeded in this manner, —"And I direct that all the aforesaid legacies shall be paid, *by and out* of the monies which are now due and owing from *A. Davidson* of *Madras*, Esquire, upon bond; but my will is, that in case I shall receive the said monies, or alter the said securities, such receipt or alteration shall not be deemed or construed a revocation of any or either of the said legacies, but the same shall in such case be paid by and out of some other part of my estate and effects; and that all such legacies shall bear interest after the rate of *five per cent per annum*, from the time of my decease; and that the interest of the several legacies intended for the said *B.* and *D.* and *E.* shall be paid to them respectively, or be applied by my executors hereinafter named, for or towards the maintenance and education of them the said legatees; according to their several provisions so intended for them respectively, until the said principal legacies shall be paid and payable. And as to all the rest, residue and remainder of my estate and effects, of what nature or kind soever, and whether in settlement or not, I give, devise, and bequeath the same unto my dear and loving wife *F.* for her own use and benefit absolutely." And he appointed his wife and the said *E.*, executor and executrix of his will. The bond was dated the 5th of May 1783, to secure

(*n*) See *ante*, p. 173. (*o*) 1 P. Will. 778. stated *supra*, p. 154. (*p*) 2 Mad. 223.
(*q*) *Ante*, p. 153. and *vide supra*, p. 166. *et seq.* as to legacies given *out* of stock.
(*r*) 1 Meriv. 178.
(*s*) 4 Ves. 150. and see Earl of *Thomond* v. Earl of *Suffolk*, 1 P. Will. 461.

5000*l.* and an arrear of interest. The amount of this debt being diminished by receipts of the testator in his lifetime, the sum owing upon this security at his death was, 3,583*l.* 9*s.* 6*d.* The obligor proving insolvent, a question arose whether the above legacies, amounting to 5000*l.* given with a view to the money due upon the bond, should be made good out of the general residue of the testator's estate, which depended upon another question, whether they were to be considered specific or general legacies. And Lord *Rosslyn*, determined that the legacies were general, and said that the legacies were not given specifically, and that he could not apply any rule to them, which had been laid down as specific legacies; that the testator had not given the bond in *form* nor in *substance*, and that the legacies were *charged* upon the bond, but did not amount to a gift of it; that if the bond had been a good security, it was worth much more than the amount of the legacies with legal interest, from the death of the testator, and that, therefore, the benefit of the bond belonged to the residuary legatee, as a substantive part of the testator's estate, charged with the legacies,(*t*) that the Court would have laid hold of the bond, and not have permitted it to be applied to the prejudice of the legatees, except for the payment of debts; and that the legacies might be said to be specific, in the respect that they were not to abate. His Lordship concluded in observing, that there was no principle upon which he could say, that the legacies were not to be paid out of the residue, except by indulging in a strain of conjecture, which was too slight and too dangerous for the Court to act upon.

With the last case agrees the decision of Sir *William Grant* in *Smith* v. *Fitzgerald.*(*u*)

In that case *A.* after reciting in his will that the *Nabob* of *Arcot* was indebted to him in upwards of 10,000*l.* arrears of his annuity; and after directing, that bills, remitted on that account, should be lodged with his bankers, and the balance, after adjusting their account, paid to his attornies, made the following dispositions: should the whole of *this* sum be received at stated periods, I give and bequeath *out* of it 1000*l.* to *B.*, 1000*l.* to *C.*, 2000*l.* to *D.*, 1000*l.*, to *E.*, my godson, 1000*l.* to *F.*, my godson, 1000*l.* to *G.*, my godson, to the daughter of *H.*, by name *Sarah*, 2000*l.* of lawful money of *Great Britain*. I bequeath 1000*l.* of this debt to the use of the poor of the town of *Woolwich* in *Kent*, (as therein directed.) *From this* debt of his Highness, I give 500*l.* to the charity school of *Madras*, for, &c.; and 500*l.* to the different hospitals at *Bath*, to the relief, &c. I have here bequeathed 11,000*l.* to several purposes. The testator then said, "that should this just debt from the *Nabob* be paid," there would be coming to him 12,000*l.*; 1000*l.* of which he left for casualties; and he directed, that after payment of legacies (except those mentioned from the Nabob's *debt*, as they might require time,) the balance (exclusive of the Nabob's) should be divided among his trustees or survivors. It was one of the questions whether the legacies given *out* of the debt of the Nabob, were to be considered specific, or, in other words, whether that debt, whatever

(*t*) See *Lambert* v. *Lambert*, 11 Ves. 607. stated *ante*, p. 171.
(*u*) 3 Ves. & Bea. 2. 5.

its amount might be, was not intended to be divided among the legatees? And his Honour decided upon the principle before frequently mentioned, viz. the distinction between a gift of the fund itself, and a sum of money *out* of it, that the legacies were general and not of aliquot parts of the specific debt owing by the Nabob. He observed, that the testator had not directed the debt to be divided among the legatees in a given proportion, but on the contrary, gave to each a *precise sum* to be paid *out* of that debt, whenever it should be recovered; that it was clear the testator conceived that the legacies would exhaust, or nearly exhaust the whole debt, according to his computation of its amount, but that still a gift of a *sum* of money, though with ever so plain a reference to the amount of the fund, is very different from a gift of the fund itself, with all the chances of its actual amount.

In the following case the same Judge adhered to this distinction, and decided according to what has been stated, that when a legacy is given *out* of a fund, no other legatee can subject it to his demand until the first legacy has been satisfied. The authority alluded to is *Acton* v. *Acton*.(*x*)

In that case *A.* by a codicil bequeathed to his daughter *B.* a portion of 12,000*l.* and to his niece *C.* 4000*l.* directing that the latter sum should be paid *out* of the money in the hands of his bankers or agents in *England*. There was a sum exceeding 4000*l.* in the hands of *A.*'s agent when *A.* died, but his other personal estate was not sufficient to pay those two legacies and all the others given by the will. If the legacy of 4000*l.* were specific, there could be no question upon the right of the legatee to be fully paid out of the fund, and the question was, whether, as this legacy was in form general, but given out of a particular part of the personal estate, that circumstance constituted such a lien upon it as to entitle the legatee to have that fund appropriated in payment of her legacy, before any part of it should be applied in satisfying the other legacies; and Sir *William Grant* determined that she had such right.

Although the general rule of construction be such as before mentioned when legacies are given *out* of a debt or security; yet it is not so absolute as to admit of no exceptions, as we have seen in the fifth section when treating of bequests out of stocks or annuities in public funds.(*y*) If, therefore, it appear upon plain inference drawn from a strong, solid, and rational interpretation of the whole will, that the testator meant to give the indentical debt or security, then although the bequest be in form such as that according to the *primâ facie* rule of construction, it ought to be considered general, *i. e.* of so much money, and the debt or security a primary fund appropriated for its payment, still the intention so appearing will prevail and constitute the bequest specific, viz. of the debt or security itself. As an instance of this:

In *Badrick* v. *Stevens*,(*z*) *A.* bequeathed in the following manner: "I bequeath to *B.* and *C.* who formerly lived servants with me, the sum of 30*l.* each, to be severally paid to them, within three months next after my death, *out* of 200*l.* due from *D.* to me upon bond. Also, I give to *E.* and *F.* the sum of 50*l.* each, to be severally paid

(*x*) 1 Meriv. 178. (*y*) *Ante*, p. 168. (*z*) 3 Bro. C. C. 431, ed. by Belt.

to them, within three months next after my death, *out* of the said sum of 200*l.* due to me from the said *D.* Also, I bequeath to the said *D.* the sum of 40*l.* being the *remainder* of the *said sum* of 200*l.* due from him to me as aforesaid." And after giving other legacies, *A.* bequeathed the residue to *G.* and *H.* The money on the bond having been received by *A.* it became necessary to consider whether the legacies were given as specific parts of the bond debt, or as money legacies; that debt being pointed out as the primary fund for their payment. And Lord *Thurlow* determined that the legacies were specific, and consequently adeemed.

The similarity of the last case to that of *Sleech* v. *Thorington*(*a*) before stated,(*b*) will not have escaped observation. In both instances, the intention to bequeath specifically, plainly appeared from the disposition of the funds in fractional parts, and *describing* the gifts of the last portions as the *remainder* of the whole. That word clearly imported a *reference* to something that the testator had, and which he was disposing of *specifically;* the subject in the present case being the debt upon bond, and in the other *South Sea* stock. It is safer to ascribe Lord *Thurlow's* decision to the principle and authority of *Sleech* v. *Thorington*, than to the mere circumstance of the lagacies being equal in amount to the debt. For when there are no expressions, in reference to the fund, plainly manifesting that it alone was the subject of bequest, there appears to be no more reason for holding the legacies specific, because they happen, as a total, to equal in amount the fund referred to for their payment, than when there is only *one* legacy equal in value with the debt or fund; a circumstance which we have seen to be insufficient to render the legacy specific.(*c*)

Sect. VIII. Bequests of general personal Estate.

In the preceding pages have been considered what are and what are not specific legacies of chattels, sums of money, stocks, debts, &c. The next subject presenting itself is, when a bequest of *general* personal estate will and will not be specific. And,

1. When the bequest will be specific.

It was noticed in the beginning of the fourth section,(*d*) that to make a money legacy specific, the money must be so described by the testator, as to empower the legatee to say to the executor, deliver the sum bequeathed to me, which is in a particular chest, bag, or purse. In such a case, the thing given is distinguished and separated from the general estate, and specifically bequeathed, and capable of being delivered *in specie*.

The same tests must be applied in ascertaining whether legacies of *general* personal estate are or are not specific; for such bequests may be specific; yet the bequest of all a person's personal estate generally is not specific: the very terms of such a disposition demonstrate its generality. But if *A.* bequeath to *B.* all his personal estate *at C.*, or in a particular house or country, the legacy will be specific; for it is confined in its extent, and falls within the description before given of such a legacy: *B.* can say to the executor, deliver to me all *A.'s* personal estate at *C.*, or in the particular house or country, for I am entitled to receive it *in specie*.

(*a*) 2 Ves. sen. 561. (*b*) *Ante*, p. 164. (*c*) *Ante*, p. 158. (*d*) *Supra*, p. 176.

Accordingly, *A.* having personal property at *B.* and elsewhere, bequeathed to his wife *C.* all his personal estate at *B.* There were other legacies, and a deficiency of assets to pay all of them. The question was, whether the bequest to *C.* was specific; in which case she would not be obliged to abate with the other legatees? And the Court decided, that the legacy was specific.(*e*)

So also in *Nisbett* v. *Murray*,(*f*) the testator, after giving two specific legacies out of his property *in* the island of *Jamaica*, (having first charged all his property generally with the payment of debts,) bequeathed the rest and residue of his real and personal estates in *the said island of Jamaica*, to trustees, also his executors, to sell, and invest the proceeds, with all other monies belonging to his estate on security in *England;* and he then gave a variety of legacies, and the remainder of *the* monies, to his executors beneficially. Lord *Alvanley* determined, that this was a specific legacy of all the testator's property *in Jamaica*, from the effect of the controlling words "in *the said island of Jamaica*," to trustees, also his executors, to sell, and invest the proceeds, with all other monies belonging to his estate on security in *England;* and he then gave a variety of legacies, and the remainder of *the* monies to his executors beneficially. Lord *Alvanley* determined, that this was a specific legacy of all the testator's property *in Jamaica*, from the effect of the controlling words "in the said island of *Jamaica*."

The cases before referred to are authorities for the following bequests being specific: "of all the goods, &c. in a particular room"(*g*); or "of all goods and chattels in a described county"(*h*); or "of all plate, linen, and furniture in my house at *A.*, or which shall be therein at the time of my decease."(*i*) The principle of decision is that which has been stated, *viz.* the severance of this particular property from the great body of the estate, and the specific gift of it to the legatee.

2. Since, then, a bequest of personal estate requires, as before mentioned, to be limited or controlled to some particular place, or to be referred to as in some person's hands,(*k*) in order to make it specific, it follows, that if there be no such restrictive expressions, a legacy of personal estate generally will be general, and not specific; so that if real and *personal* estates were given by will to *A.* for life, remainder to *B.*, neither the circumstance of the bequest of the personal property being in the same sentence as the real, the devise of which was necessarily specific, nor the circumstance of the real and personal estates being dealt out together in portions, would be sufficient to constitute the disposition of the general personal property a specific legacy. This will appear from the following case:—

In *Howe* v. the *Earl of Dartmouth*,(*l*) *A.* devised to his wife *B.* all his personal estate whatsoever (with an exception) for life, subject to legacies, &c. He also left to her all his real estates for life, and

(*e*) *Sayer* v. *Sayer*, 2 Vern. 688. Pre. Ch. 392. *S. C.*
(*f*) 5 Ves. 150. 156, and see *Sadler* v. *Turner*, 8 Ves. 617. 623.
(*g*) *Green* v. *Symonds*, 1 Bro. C.C. 129, notes. (*h*) *Moore* v. *Moore*, ibid. 127.
(*i*) *Gayre* v. *Gayre*, 2 Vern. 538. *Shaftesbury* v. *Shaftesbury*, ibid. 747. *Land* v. *Devaynes*, 4 Bro. C. C. 537.
(*k*) *Ante*, p. 155. (*l*) 7 Ves. 137.

afterwards all his *personal* and *real* estates to *C.* for life, and then to the first and other sons of *D.* in succession, subject to the payment of certain legacies and annuities. A considerable part of the personal estate consisted of bank stock and long and short annuities. *B.* died before *A.*, and after the death of *C.* who survived *A.*, a question arose between *C.'s* personal representative, and the person next entitled in succession, whether *C.* as tenant for life of such funds as bank stock, carrying a higher rate of interest, and long and short annuities wearing out rapidly, had not received a larger sum of money for interest and dividends than she would have been entitled to if the funds had been sold immediately after the testator's death, as they ought to have been, and the produce invested in the purchase of three *per cent* consols. That question necessarily depended upon a preliminary one, *viz.* whether the bequest of the personal estate was general or specific? If the former, *C.'s* receipts were too large, and could not be allowed to the prejudice of those persons intended to take after her. If the latter, *C.* was entitled to the enjoyment of the funds *in specie* from the death of the testator, and consequently to receive their full annual produce. And Lord *Eldon* determined that the legacy was a general one: and that *C.'s* estate should answer for the excess of her receipts as tenant for life; observing, that the legacy could only be specific upon one of two grounds, *viz.* either upon the *words* describing the personal estate, or upon the construction of those words, *coupled* with the devise of all the landed estates of *A.*; for every devise of land, however expressed, was of necessity specific. There being no description of the personal estate so as to render the bequest of it, even in this sense, specific; *viz.* expressive of *A.'s* intention, that the personal estate *he left* at his death, should be enjoyed by the successive legatees in its then state, his Lordship took the second ground, and said, that the intention to bequeath personal estate specifically, had never been considered manifest, from a disposition of the personal estate in the same clause with land, which must be taken to be specifically given: and that the cases did not go the length, that if the enjoyment of personal property were portioned out in life interests, with remainders over, it was specific.

Allusion was made in the last case, to legacies of general personal estate specific in this sense, that the legatee should take it discharged from debts and legacies. But this species of bequest does not regularly fall under present consideration, since its basis is an *inference*, not made in general cases, upon the bequest of all the testator's personal estate, but on the effect of that circumstance, *connected* with what arises out of other parts of the will, with regard to the intention to fix, upon other property, charges that would, in the first place, fall upon the personal estate bequeathed; so Lord *Eldon* expressed himself in the last case. The treating, therefore, upon this kind of specific legacy, will be postponed till we arrive at the chapter* in which it is proposed to consider the instances in which a testator's personal estate, instead of being the primary, will be only the secondary fund for the discharge of debts and legacies, *viz.* a fund in aid of the real estate.

* Chap. XII.

CHAPTER IV.

Rights of Specific Legatees under the Words of the Will, and against the EXECUTORS; *and the Rights of Specific Legatees of Goods and Chattels in remainder against Specific Legatees for life.*

THE subjects of the present Chapter will be discussed under the following arrangement:

SECT. I. What personal estate will pass to specific legatees under the words of the will.
1.—*Considering when the words refer to the date of the will, and when to the death of the testator.*
2.—*What will pass by the words* goods, household goods, personal estate, property, *and* things *when referred to as being* in a particular place; *and*—
3.—*When the words* goods, &c. *will be restrained to such only as are* ejusdem generis *with those specified in the will, and when not.*
4.—*Construction of the words* household furniture, household stuff, chattels, live *and* dead stock, stock upon a farm, effects, utensils, money, security for money, medals, debts, linen *and* clothes, farm *and* plate.

SECT. II. What will pass a specific bequest of *personal estate* in the Colonies.

SECT. III. Of the title of a specific legatee to an excess of the fund whether of *capital* or *profits accrued between the date of the will and the death of the testator.*

SECT. IV. Of mistakes in regard to the subject specifically bequeathed.
1.—*In the description of the fund, and the admissibility of extrinsic evidence.*
2.—*Of the admission of such evidence to show a testator's intention by explaining the sense in which he used the* words *of the bequest;*—*and*
3.—*The consequences of* mistakes *in the* calculation *of the specific funds when they are wholly given to* one *person, and when to* several *persons in fractional parts.*

SECT. V. The rights of specific legatees against the executors.

SECT. VI. The rights of specific legatees of goods and chattels in *remainder* against the preceding tenants *for life.*
1.—*When an* inventory *or* security *will be required;*—*and*
2.—*The rights where a tenant* for life *of a lease surrenders the old and takes a new one;*—*and*
3.—*Of contribution on the payment of fines.*

Sect. I. What personal Estate will belong to the specific Legatees under the *words* of the Will.

1. In considering this subject, there are two periods of time to be noticed; the one the date of the will, and the other the death of the testator; for if a testator show an intention to dispose of such goods or personal estate as belonged to him at a particular place when he made his will, as by the terms "of all such part of my personal estate as is *now* in my house at *A.*" property afterwards brought into that house will not pass to the legatee.

Accordingly, in *Dormer* v. *Burnet*,(*a*) *A.* bequeathed to *B.* her house in *C.*, and by a codicil, "all the goods *she brought into the house*, except what are mentioned in a schedule." There was no schedule found; and the Court held the exception void, but the devise good; and that none of the goods passed, save those which were *in* the house at the time the codicil was made.

In unison with the last case are the observations of Lord *Eldon*, in delivering his judgment in *Howe* v. The Earl of *Dartmouth*,(*b*) before stated.

So also in the *Attorney General* v. *Bury*.(*c*) *A.* devised all the arrears now due and *unjustly detained* from him by *B.* to be employed in a certain charity. The question was, whether arrears which incurred after the date of the will should pass? And the Lord Keeper decided in the negative, because the devise was confined to the arrears due when the will was made.

But if the bequest be general, as "of all the testator's goods, &c. *in* a particular house or place," or "which he shall have or leave there at the time of his death;" whatever personal chattels(*d*) are found there at that period will be the property of the legatee.

Thus *A.* devised "all his personal estate at a place called *W.*" to his wife *B.* And as to what passed by this bequest, the *Chancellor* declared, that under those general words, whatever personal estate the testator had at the place described at the time of his death passed to the legatee; and that the legacy was to have relation to that period, and not to the date of the will.(*e*)

So also in *Gayre* v. *Gayre*,(*f*) *B.* devised his house in *C.* and all his goods, &c. *therein to D.* for life, &c. The Lord Keeper decreed, that the goods and furniture in the house at the death of the testator passed to *D.*

But to confine the words of the bequest to the making of the will, the expressions must unequivocally refer to the property which the testator then had; otherwise they will not be allowed that effect. If then a testator were to bequeath to *B.* his library *now* in the custody of *C.*; since the word *now* is more applicable to the description of where the library was than to limiting the legacy to identical books in *C.*'s possession, books afterwards added to the library will pass to the legatee. In illustration of this,—

B. bequeathed in these words: "I devise my library of books *now*

(*a*) Cited in *Downing* v. *Townsend*, Ambl. 281. (*b*) 7 Ves. 147.
(*c*) 1 Eq. Ca. Abr. 200. pl. 12. (*d*) 3 P. Will. 335.
(*e*) *Sayer* v. *Sayer*, 2 Vern. 688.
(*f*) 2 Vern. 538. and see *Masters* v. *Masters*, 1 P. Will. 421—424. *Green* v. *Symonds*, 1 Bro. C. C. 129, *in notis*.

in the custody of *C.* to All Souls College in Oxford;" and he gave to the same college 4000*l.* more to augment their library. *B.* afterwards bought several valuable books, which were placed in the library. And it was the question, whether those books passed to the college? The then Master of the Rolls determined in the affirmative, upon the construction of the word *now;* his Honour being of opinion, that *now* did not relate to the books which were in the library at the date of the will; but that it denoted *where* the library was, and might have been intended to distinguish that particular library from any other belonging to the testator.(*g*)

It is, however, in general essential,(*h*) that the goods intended for the specific legatee should be actually in the house at the death of the testator; for as none but such as are then in that situation answer the terms of the bequest, none other can pass to the legatee, under whatever circumstances evincing the testator's intention to have placed particular articles in the house, which never were there, if he had not been prevented by death.(*i*)

Accordingly, in *Grandison* v. *Pitt*,(*k*) *A.* bequeathed to *B.* his goods and furniture in and at his house at *C.* and belonging to *C.* He had ordered some furniture for that house, which was not carried there before his death; and it was determined, on the authority of the case of the Duke of *Beaufort* and Lord *Dundonald*,(*l*) that such furniture did not pass.

The period being settled to which the specific bequest refers, the next consideration is the species of property which will be comprehended under the expressions used by the testator.

We shall commence our inquiry with the effect of the word "goods;" when the bequest is of goods, generally, and also when that term is controlled by confining the legacy to such goods as are in, or at, a particular place, and therefore specific.

2. The word "goods" is *nomen generalissimum*, and when construed in the abstract, the term will embrace all the personal estate of a testator, as bonds, notes, money, plate, furniture, &c.(*m*) Such is its effect by the canon law, as well as by our own, which seems to have adopted the former. By the civil law *bona mobilia*, and *bona immobilia* were the *membra dividentia* of all estates; so that as *bona immobilia* were land, *bona mobilia* included all personal property.(*n*)

But when a testator, instead of bequeathing his goods, generally, restricts the import of that word, by limiting its effect to those in a particular situation, as by specifically bequeathing "all his goods in the house at *A.*" In such and the like instances, since the goods given are connected with a subject in its nature showing the sense in which the term was used by the testator, *viz.* restricted to such articles and things as were in possession and not in action, those only *savouring of locality*, will pass to the legatee. Such as furni-

(*g*) *All Soul's College* v. *Coddrington*, 1 P. Will. 597.
(*h*) See chap. V. sect. 1. sub-sect. 3.
(*i*) See Lord *Shaftesbury* v. Lady *Shaftesbury*, 2 Vern. 747. and Lord *Eldon's* observations, 11 Ves. 662. (*k*) 2 Vern. 740. ed. by Raithby, in a note.
(*l*) 2 Vern. 739. and see *Heseltine* v. *Heseltine*, 3 Madd. 276.
(*m*) See 1 Atk. 180. 182. 3 Atk. 62. *Moore* v. *Moore*, 1 Bro. C. C. 128.
(*n*) Swinb. pt. 7. sect. 10. Anson. 1 P. Will. 267.

ture not attached to the freehold,(*o*) linen, plate, money, and bank notes, which are considered money, but not bonds, mortgages, receipts, &c. which have no locality in the sense required in these cases, as will appear from the authorities which we shall proceed to state.

Thus in *Chapman* v. *Hart*,(*p*) *A.* bequeathed to the plaintiff in consideration of her care of him during his sickness at *Antigua*, 500*l.* and all his goods and chattels in his house, and on board the *Warwick* man of war, to be by her disposed of to such of his nephews and nieces as she should find most friendly to her, to be kept as memoranda of him. And Lord *Hardwicke* said "undoubtedly no goods and chattels can pass but such as were *property in possession*, not *choses in action*, except bank notes, which the Court considers as cash; for these words may certainly extend further than to bare furniture, and if any ready money in the house (if not an extraordinary sum and just received) that would pass. In the Countess of *Aylesbury's* case,(*q*) I was of opinion, that by devise of all *things* in a house, money and bank notes, passed to the testator's wife, and that the testator meant to consider the notes as cash, but bonds do not pass, not admitting of a locality, except as to the probate of wills, &c." Again—

In *Green* v. *Symonds*,(*r*) *B.* bequeathed to *C.* all his goods, &c. in his study, except his books and writings. He gave to *D.* all his books at his chambers in the *Temple*. At the testator's death there were in his study, a considerable sum of ready money, securities for money and plate; but he had removed the books into the country. One of the questions was, whether *C.* should take the money, securities, &c. which were in the study, or the furniture only. And the Lord *Chancellor* held, the money and plate to pass, but *not* the *securities* for money, as they were *choses in action*.

The case of *Moore* v. *Moore*,(*s*) determined by Lord *Thurlow*, is a leading authority upon the present question, *viz.* that bonds and other *choses in action* will not pass to a specific legatee by the words "goods and chattels."

In that case, the testator left a testamentary paper which was established in the ecclesiastical court, and by which he bequeathed as follows: "I give all in *Suffolk* to *R. Moore* and heirs. I give to *R. Moore* all my goods and chattels in *Suffolk*." The testator had goods and chattels in *Suffolk*, and also in other counties; and in a drawer at his house in *Suffolk*, a bond was found which the plaintiff claimed specifically as goods and chattels in *Suffolk;* and the question was, whether he was entitled to it as part of his specific legacy? And Lord *Thurlow* said, the question was, whether from the context the bond could pass? As to the point of construction, said his Lordship, the Court construed legacies according to the canon, not the common law. It was argued, that *bona* included all credits, as well as chattels at common law, and that the words "all goods and *chattels*" would pass bonds and all credits. As to that, Lord *Thurlow* observed, that the true point was, whether the context would

(*o*) 3 P. Will. 335. (*p*) 1 Ves. sen. 271. (*q*) *Pofham* v. *Aylesbury*, Amb. 68. Corrected by Lord *Eldon*, 11 Ves. 662. (*r*) 1 Bro. C. C. 129. *in notis*.
(*s*) Ibid. 127.

qualify the meaning of goods and chattels? That whenever words were used in an instrument, it was a good rule to say they shall be construed according to their legal sense. In order to construe them otherwise, there must be something to show that they are used in a less technical meaning; a fact to be shown by the person claiming under the particular sense; and his Lordship proceeded to the following effect: "First, it has been argued, that the words do not mean credits; I think they do: *secondly*, that the words, when local, do not imply them; and, with respect to specialties, that they have no locality; the question is, whether this peculiar kind of credits has that sort of locality which was within the idea of the testator? This is not a solemn codicil, and requires therefore a more favourable construction. The sentences are mangled and imperfect. It is contended that this sort of credits has locality, because the law has made it *bona notabilia*. But it is doubtful whether the Court christian having thought it sufficiently local for that purpose, is enough to make it local as to this. If the question hung more in doubt than it does, I should be obliged to follow Lord *Hardwicke's* case.(*t*) The judgment there goes clearly to this case. He has compared bank notes to money. *Choses in action* have no locality. Bonds have no more locality than other *choses in action*, otherwise than by drawing the jurisdiction of the ecclesiastical court; and the judgment in that case must prevail. In this also it has weight, that the house was given to the same person. Removal of goods for a necessary purpose, is not an ademption of a specific legacy; but would you follow bonds and judgments in the same manner? It would be too much to argue it in that way. The authority of that case must go so far as to include bonds with other *choses in action*, as to that want of locality." Bill of *R. Moore* dismissed.

The several cases which have been adduced, concur in establishing that bank notes will pass to the specific legatee under a bequest of all goods in the testator's house. The reason is, that they are considered money, and not merely as representing money. This being so, it is an apparent consequence of the decisions made by the courts of law, that Exchequer notes, promissory notes payable to bearer, Exchequer bills and bills of exchange *indorsed* in *blank*, are not to be considered *choses in action*, but money of the persons in whose possession they are;(*u*) and that those instruments possessing equally with bank notes, the locality required, will pass to the legatee under the terms of the above bequest.

The term "household goods" is frequently adopted by testators. By that word, every thing of a permanent nature, *i. e.* articles of household which are not consumed in their enjoyment, that were used in, or purchased, or otherwise acquired by a testator for his house, will pass to the legatee, as will appear from the cases afterwards produced.

But if a testator, having goods or household goods of his own and others, used in *his trade*, specifically bequeath his household goods, or goods in his house in which there are also goods in his business, the latter will not pass by those words, but it will be presumed that

(*t*) *Chapman* v. *Hart*, *supra*, p. 190. (*u*) See *Collins* v. *Martin*, 1 Bos. & Pull. 648. 651. and *Wookey* v. *Pole*, 4 Barn. & Ald. 1. Also see Chap. I. p. 36.

the testator used them as applicable to such goods and furniture with which his house was supplied for his comfort and convenience, and not with an intention to include those that constituted the bulk of his personal estate.

Accordingly, in *Pratt* v. *Jackson*,(*x*) *B.* a freeman of *London*, upon his marriage with *C.* made a liberal provision for her, and the issue of the marriage, by articles of settlement; and it was declared that the articles should not extend to prevent *C.* from having any legacy or bequest that *B.* should think proper to leave her, *nor to all or any of the household goods*, or utensils of household stuff, rings, plate, jewels, or linen of *B.* at his death; all of which she was to receive and enjoy absolutely. *B.* died intestate, and without issue, and *A.* was his administrator. *B.* before his marriage, and when he died, was possessed of an hospital near *Gosport*, which he employed in entertaining sick and wounded seamen of the royal navy, under contracts with the commissioners, and which he had furnished for the purpose, with nearly seven hundred beds, and other furniture suitable only for such services, and not for private use. These, *C.* claimed as household goods, or utensils of household stuff, within the meaning of the articles; and Lord *King* decided in favour of her claim. But *A.* the administrator, appealed from the decree; for whom it was insisted, that the goods and utensils in the hospital were used by *B.* in a public business and undertaking, in the nature of a trade, at a place upwards of seventy miles from *London* where he lived, and where he never resided, nor had so much as an apartment for his own use; the whole undertaking being entirely carried on by agents and servants; that, according to *C.'s* construction, she might have been entitled to the whole of *B.'s* personal estate, if he had been of a trade in which he might have employed his estate in household goods, or utensils of household, or wherein he occasionally might have laid out his money for improvement; and that as *C.* and her children were so liberally provided for by the articles, she was not entitled to a strained construction of them. For all which reasons, the decree ought to be reversed, and it was so ordered by the House of Lords.

But the reader's attention must be drawn to the case of *Nicholls* v. *Osborn*,(*y*) in which *A.* bequeathed her "household goods" to *B.* The question was, whether her *plate* passed by those words? And although the Master reported that there were manifest intentions and declarations of *A.* that she did not mean the plate to pass; yet, since he certified it to have been commonly used in the house, the Master of the Rolls rejected all the evidence regarding the intention, there being a complete and plain will in writing, which should not be altered or influenced by *parol* proof. Upon a petition presented to his Honour to rectify the minutes in the cause, alleging, that as the registrar had taken them, *A.'s* plate generally was directed to be delivered to *B.*; whereas, it appeared that part of the plate she was possessed of at her death was only *in pawn* to her, and that doubts had arisen whether such part would pass under the general direction, his Honour

(*x*) 2 P. Will. 302. Reversed by the House of Lords, 1 Bro. Parl. Ca. 222. 8vo. ed. and referred to by Lord *Hardwicke* in *Crichton* v. *Symes*, 3 Atk. 63. and *Le Farrant* v. *Spencer*, 1 Ves. sen. 97. (*y*) 2 P. Will. 419. ed. by Cox.

declared, that as well the plate which was the testatrix's own, as that which *was pawned* to her and was in common use, passed by the bequest.

In considering this and the preceding case, it seems reasonable to doubt whether so much of the decree in the case last stated, as declared, that the plate *in pawn* to the testatrix *A.* passed to the legatee, would be now adopted, for such plate was not *A.'s* to dispose of; and its being used by her affords no conclusive evidence of her intention to include it as part of *her* household goods, since there was other plate to satisfy those words; and the use of the plate pledged with her was distinguishable from that of her own as being merely temporary, *i. e.* until redemption; hence, it seems reasonable to infer, that by the words, "household goods," she only intended to dispose of such as were absolutely her own; and it is conceived, that the principle of the case of *Pratt* v. *Jackson*, applies to the present, which may be considered as over-ruled by it.

That *plate* will pass by the description of "household goods," appears not only from the case last stated, but also from the authorities after mentioned. It seems, however, to have been the law of the Court of Chancery at an early period, before plate was in common use, that it should not be considered as included in a bequest of household goods or furniture; but since that time, as the nation grew richer, and plate became more general, the law of the Court altered by degrees; and it seems to be now settled, that plate will be included under those words, and that *parol* evidence of a contrary intention in the testator, will not be admitted.(*z*)

In *Flay* v. *Flay*,(*a*) *A.* bequeathed his "household goods" and stuff to his wife, and died, having made his daughter executrix. The question was, whether by the devise the wife should have the plate which was commonly used about the house, *viz.* a tankard and twelve silver spoons; and whether she should have a bracelet that she used to wear, and some pieces of old gold, *viz.* two pieces which were given by her husband for her concurrence in a fine, and some other pieces that were presents before marriage from her godfathers and other friends, which she had kept all the time of the marriage? And it was resolved, that the tankard and spoons *commonly used* about the house passed by the words "household goods:" and that as to the bracelet and pieces of old gold, (they not being wanted to pay debts), since they were presents (as before mentioned), and were permitted by her husband to be enjoyed by her while she lived, it could not be intended, without express words, that he meant to deprive her of them at his death; and, therefore, that they should remain with her.

So in *Snelson* v. *Corbet*,(*b*) *B.* by will, gave all his plate to his wife; and by a codicil he bequeathed to her the *use* only of his "household goods" for life. And by Lord *Hardwicke*:—"If *B.* had given all his household goods and plate I should have had some difficulty; but the question now is, whether he meant to include *plate* in the words, "household goods." There is evidence of the plate *being*

(*z*) See the last case, and 2 Vern. 638. 1 P. Will. 425. 3 P. Will. 419.
(*a*) 2 Freem. 64. (*b*) 3 Atk. 370.

used in *B.'s* house, and I am of opinion, therefore, that household goods do include plate."

From the cases before stated and referred to, it appears that the circumstance of the plate being in *common use* was considered to be material. But in *Kelly* v. *Powlet*,(*c*) the Master of the Rolls denied that it was of any consequence whether the plate was in common use or not, provided it were *suitable* to the situation and quality of the testator.

It has been decided, that in bequests of "household goods," all such articles found in the house whose use is in their *consumption*, or do not naturally fall within the description of "household goods," were not meant by the testator to be included, and therefore did not pass to the specific legatee.

Thus, in *Slanning* v. *Style*,(*d*) *A.* after giving to his wife specific chattels for life, bequeathed to her his tea-table, tea-kettle, and all his pewter, brass, linen, and woollen, with "all his household goods," and implements of household, *in* or *about* his dwelling house, to be at her disposal. And all his stock of corn, and the residue of his personal estate, he gave to his three sisters equally, whom he had appointed executors. The widow claimed the *malt* and *hops* in the house, also the *ale* and *beer* in *it*, together with the guns, pistols, and the clock; insisting that they were intended for her by the bequest of "household goods and implements of household," since they were goods in the house, and necessary for the use and support of the family. But by Lord *Talbot*, Ch. "These things which are *victuals*, and whose use is in their consumption, cannot, in their common natural sense, be taken to be household goods, and pass under that denomination; they, therefore, do not belong to the widow, but to the executors, the residuary legatees. Neither will the guns and pistols, if used in riding or the shooting of game, pass to her by those words, although they may in some sense be said to be for defence of the house; but the clock in the house, *if not fixed thereto*, will be included in the words, "household goods."

The last case appears to be a decision that those articles of furniture only, which are detached from the freehold, will pass by the words "household goods and implements of household." The principle seems to be, that such articles alone were within the contemplation of the testator, and that an intention ought not to be imputed to him in the use of those general words to include fixtures, which are parts of the freehold, and go with it to the heir or devisee.(*e*)

The words of which we have been treating were limited to such goods and household goods as were *in* a *particular* place. But the import of those terms will be greatly enlarged when the expressions of the bequest are extended not only to such goods or household goods as are *in*, but to those also *about*, the testator's dwelling-house and outhouses. An instance of this occurred in the following case:

(*c*) Ambl. 605. approved of by Lord *Alvanley* in *Porter* v. *Tournay*, 3 Ves. 313.
(*d*) 3 P. Will. 334. See also *Porter* v. *Tournay*, 3 Ves. 313.
(*e*) See *Elwes* v. *Maw*, 3 East, 51. where the prior cases are collected. Also, *Davis* v. *Jones*, 2 Barn. & Ald. 165. and *Buckland* v. *Butterfield*, 2 Brod. & Bing. 54.

In *Gower* v. *Gower*,(*f*) *A.* directed by his will that all his plate, furniture, "household goods," and all books and other furniture of his library, and all stores and implements of all sorts and kinds, and "other goods and chattels" whatsoever, which should be *in and about* his dwelling-house and outhouses at *B.* at his death, should be preserved for, and held and enjoyed by such person or persons as should be entitled to his estates in *C.* and *D.* under the limitations in his son's marriage settlement. The question was, whether running horses which were at *B.* at the death *A.* passed by the above words? And Lord *Henley* thus expressed himself: "*A.* intended that nothing should be disturbed about the estate at *B.*, but that every thing there, whether of profit or amusement, should pass. I am of opinion that the running horses are comprehended within the words."

The remarks which have been made upon the import of the words "goods" and "household goods," equally apply when the terms of the specific bequest are of all the testator's *property* or *personal* estate, in, or in and about, his dwelling-house. Hence, neither bonds nor other *choses in action*, and probably Exchequer notes, &c. as before mentioned,(*g*) will pass to the specific legatee.

Accordingly in the case of *Jones* v. *Sefton*,(*h*) *B.* bequeathed to Lady *Sefton* all the residue of his personal estate and effects of what nature and kind soever, *except* such parts as should be *in* and *about* his house at *C.*; which parts he gave to his son Lord *Sefton*, and directed his household furniture to go as heir-looms. *B.* also gave all arrears of rent which should be due to him from his *Lancashire* estate at his death, to his son. By the decree an inquiry was directed as to what parts of *B.'s* personal estate were in and about his house at his death, and the natures of them. It appeared from the report, that in an iron chest, in which the *steward* kept the cash arising from rents and profits, was found a bond to *B.* dated in *November* 1784, for securing 215*l.* 10*s.* arrears of rent, and in cash 373*l.* 2*s.* 9*d.* The question was, whether the bond and cash found in the iron chest passed to Lord *Sefton* under the exception and disposition of the arrears of rent? And Lord *Rosslyn* determined in the negative.

It is to be observed, that as in the authorities before stated, so in the last case, the bond in the house was held not to pass to the specific legatee, under the description of *part* of the testator's *personal estate.* And although those terms would in general include ready money, and even bank notes, (as appears from the cases before cited in the consideration of the import of the word "goods"), and probably Exchequer notes, &c. as before stated;(*i*) yet since the cash for arrears of rent, in the present case, found in the iron chest, was not strictly and indisputably the testator's own, nor in his possession, but in that of his *steward;* and whether such identical money was or was not the property of the testator vested in contingency, *viz.* depended upon an account between him and his steward, the Court appears to have decided, upon the presumed intention of the testator

(*f*) Ambl. 612. 2 Eden. 201. And *vide* Lord *Alvanley's* remark upon this case, 3 Ves. 313.

(*g*) See *supra*, p. 191. (*h*) 4 Ves. 166. (*i*) See *supra*, p. 191.

not to give specifically this identical cash under those circumstances, that it did not pass to Lord *Sefton*, but to Lady *Sefton*, as residuary legatee.

So also in *Fleming* v. *Brook*,(*k*) *A.* bequeathed to the following effect: "I give to *B.* all *my property*, of whatever nature or kind the same may be, that may be found in *B.'s* house in *C.*, except a bond of *D.* in my writing box in the said house contained." There were found in *B.'s* house a deed of *mortgage* from *E.* to *A.* and a bond as a collateral security; also several banker's accountable *receipts* for large sums of money. *B.* insisted that all those properties passed to her under the bequest, and that the present case differed from all those authorities in which it had been held that *choses in action* would not pass under such a bequest, because *A.* had expressly *excepted one* chose in action, which showed his intention that the others should pass. But Lord *Redesdale* determined, on the authority of *Moore* v. *Moore*,(*l*) which was decided, after a view of all the cases, that *choses in action* had no locality; and therefore that neither the mortgage, nor the bond, nor the banker's receipts, passed to *B.*, but that bank notes would have passed, as they were *quasi* cash. His Lordship did not consider the *exception* in the will of one security sufficient evidence of the testator's intention to pass the other *choses in action.*

This case is only adduced as an authority that a specific legacy of all a testator's *property* in a particular house will not pass *choses in action* there. But the question is very different when exception is made by the testator out of what, in his conception, he had given by the words in his will, without the clause of exception; and it is from this circumstance that the correctness of Lord *Redesdale's* decree may be questioned. The cases restraining the general import of a bequest of all a man's goods, property, or personal estate, in a particular place, are founded upon the presumed intention that the testator merely meant to pass such articles as belonged or were suitable to the place or house described; so that, in general, *choses in action* will not be included in such a bequest. But when a testator, by excepting a particular species of his personal estate out of the bequest, and which would not have passed if the exception had been omitted, it is clear that he used the legatory words in a sense which he conceived would have passed the excepted subject, as also all others falling under a similar description. Then, in the present case, *A.'s* particular exclusion of *one* bond from the operation of the bequest showed that he had *choses in action* in contemplation, and that he conceived the words he had used would have passed securities for money, and consequently the bond of *D.*, unless it were excepted. His meaning, therefore, appears to have been to include all securities in *B.'s* house, except *D.'s* bond; and the words "all my property, &c." being sufficiently comprehensive to include and pass them, a doubt cannot but exist of the soundness of his Lordship's decree, which doubt is countenanced by a decision of Lord *Eldon* in *Hotham* v. *Sutton*,(*m*) a case similar to the last in principle, and which will be afterwards stated in this section.

(*k*) 1 Scho. & Lefroy, 318. (*l*) Stated *supra*, p. 190.
(*m*) 15 Ves. 322—326. and see *Crichton* v. *Symes*, 3 Atk. 61. stated *infra*.

That a bequest of "all things" in a particular house will not pass *choses in action* as bonds, &c. was decided by Lord *Hardwicke* in the case of *Popham* v. Lady *Aylesbury*, before mentioned.(*n*)

In the case of *Stuart* v. the Earl of *Bute*,(*o*) a very extensive interpretation was put upon the word "things;" and it was not, as usual, restricted to articles *ejusdem generis* with those previously enumerated, in consequence of an intention, inferred from the terms of the whole bequest, that the word was used in its fullest and most enlarged acceptation. The construction was first made by Lord *Rosslyn*, and afterwards confirmed by Lord *Eldon*, after much hesitation.

The case was, that *A.* bequeathed in the following words: "I give all the wagon ways, rails, staiths, and all implements, utensils, and *things*, which at my death shall or may be used or employed together with, or in, or for, the working, management, or employment of any of my collieries or shares of collieries in, &c. and which are or shall or may be deemed or considered to be *as* or of the nature of *personal estate*, to my executors; upon trust to permit the same from time to time to be used, held or enjoyed by the person or persons respectively entitled by this my will, to the use and enjoyment of my several freehold manors, messuages, collieries, lands, and hereditaments, or parts or shares of freehold manors, &c. as far as the nature of the said property, and the rules of law and equity will admit." Upon a question whether the money due from the fitters, money in the bank, balance in the cash book in *C.'s* hands, balances owing from several persons, coals resting at the pits and staiths, corn, hay, horses, timber, and deals, oil and candles, and also all wagons and wagon materials, wagon-ways and materials belonging thereto, fire engines, machines, and gins not erected and fixed, ropes, iron, and materials at the pits, stables, storehouses, and horses trappings, gears, &c. *not absolutely employed or used at the testator's death*, together with, in or for the working, management, and employment of any of the collieries, or shares of collieries, were or not included within the terms of the above bequest; it was determined in the affirmative, upon the ground that the several enumerated articles were *necessary* for carrying on the trade, and therefore *intended* by the testator to be given to the devisees of the collieries; a construction which the Court adopted upon the same principle in the case of *Gower* v. *Gower*, before stated.(*p*)

3. It has been shown that specific bequests, by the words "goods, personal estate, property, or all things, in or at a testator's house, &c." would not pass to the legatee *choses in action;* and the reason has been given.(*q*)

But it has happened, that after, or preceding the word "goods, &c," the testator has enumerated particular kinds of chattels or personal estate; or after such an enumeration he has concluded the bequest in giving "all other things," or, "all other goods," in the place described, to the legatee. Under the above general and com-

(*n*) Ambl. 68. see *supra*, p. 190.
(*o*) 3 Ves. 212. 11 Ves. 457.
(*p*) See *supra*, p. 195. and in Ambl. 612. See also *Boon* v. *Cornforth*, 2 Ves. sen. 278--280. stated in next page.
(*q*) See *supra*, p. 190.

prehensive words, specific legatees have claimed whatever personal property was there, whether consisting of personal chattels, or securities for money; but it is a rule of construction, perfectly well settled, that the generality of those expressions is to be explained by, and confined to the descriptive words, *i. e.* restricted to such species of property as are *ejusden generis* with, and would pass by the particular words of enumeration :(*r*) so that as bonds and other *choses in action* would not pass by the bequest of goods, &c. at a particular place, neither will they pass by the addition of the apparently more general expressions of "all other things," or, "all other goods," or the like; nor will bank notes or ready money pass in those cases; for when the word "goods, property, or personal estate," are followed or preceded by a specification of chattels of a particular denomination, as, household furniture, &c. it is inferred that the testator used the word "goods, &c." in the same limited sense as those that immediately followed or preceded. Articles of property, therefore, to which the explanatory words apply, will alone pass to the specific legatee (except a contrary intention appear, as in the case of *Stuart* v. *Bute*,(*s*) last stated.) And since those words do not embrace bank notes or ready money, the terms "goods, &c." explained and confined as above, will not have that effect, although they, if standing alone, would have passed that species of property as has been before shown. The principle of decision in these cases is manifest intention collected from the will, that testators made use of the words "goods," &c. in a more confined sense than their usual legal acceptation; which, as we have seen, is the same foundation upon which courts of equity have determined, that by a legacy of "all goods at *A.*" bonds and choses in action will not pass.(*t*) To illustrate these remarks by examples,—

In *Trafford* v. *Berrige*,(*u*) *A.* bequeathed to his niece all his *goods*, chattels, *household* stuff, furniture, and *other things*, which were then, or should be *in* his house at the time of his death. Sometime afterwards *A.* died, leaving about 265*l.* in ready money in the house; and it was decreed that this ready money did not pass, for, by the words *other things*, should be intended things of like nature and species with those before mentioned.

In the last case we observed the word "goods," explained by chattels and household stuff, showing that the testator used the word "goods" in the sense of household furniture and the like; which construction being once ascertained, it is carried on, upon the basis intention, to the last expression, "other things," by confining its operation to things *ejusdem generis* with those before described.

Intention being the foundation of the restricted construction put upon general words superadded to other more limited expressions, intention may also produce different decisions in respect of the same general words in the same will, viz. it may restrain the general words in one clause, and suffer their extension in another.

An instance of this occurred in *Boon* v. *Cornforth*,(*w*) in which *A.*

(*r*) *Porter* v. *Tournay*, 3 Ves. 311–313. *Rawlings* v. *Jennings*, 13 Ves. 39. 46. stated *infra*. *Sutton* v. *Sharp*, 1 Russ. 146.

(*s*) 3 Ves. 212. 11 Ves. 657.

(*t*) See *supra*, p. 189.

(*u*) 1 Eq. Cas. Abr. 201. pl. 14.

(*w*) 2 Ves. sen. 278. 280. and Suppl. [139.] and see *Stuart* v. the Earl of *Bute*, *supra*, p. 197, and *Gower* v. *Gower*, *supra*, p. 195.

devised to his daughter *B.* the equal possession and right for *life* to live at *Le Place* with her husband, to have the use of the house, plate, linen, and "every thing else," as *her occasion* should require, as also stabling and fields, or "any thing else," notwithstanding entail after limited. *A.* also directed that all his goods, furniture, plate, books, pictures, "and every thing else," which should be at his house at *Lee* at his death should remain there to be enjoyed by the person in possession of it for the time being; and he then settled that house and lands upon his nephews and their issue. A question arose whether provisions of any kind, either for the house or stable, as liquors, corn, hay, &c. and some curiosities that *A.* had in his house, *china*, *japan*, *India* pieces for handkerchiefs, watches, and a cane, passed by either and which of those clauses? And Lord *Hardwicke* said, that considering the point on the last clause which makes the articles heir-looms, "every thing else which at my decease shall be at my house," must be construed things *ejusdem generis*, such as are proper to go with the house as heir-looms. He, therefore, decided, that the cane, watches, and *India* pieces, not made up, could not pass as *heir-looms*, much less the liquors, hay, &c.; for heir-looms meant things fixed to the freehold, the china, and every thing of that kind set up as ornaments, and to have continuance along with the house, and not consumable as those things were. But with respect to the *first* clause, his Lordship said, its construction was more extensive, comprising corn, hay, and provisions, in the house, for it was the intention to provide for *B.'s* occasions of residing and living there, not for any other occasions. And his Lordship determined that this clause included all kinds of provisions for man and horse in the house or stable.

To the same principle of intention, the decision in the case of *Woolcomb* v. *Woolcomb*,(*x*) is to be referred. In that case, *B.* bequeathed all the furniture of his parsonage house, and all his plate, household goods, and *other goods*, (except books and papers,) and all his stock within doors and without, and all his corn, wood, and *other goods*, belonging to his parsonage house, to his wife; and made *J. S.* residuary legatee. The question was, whether ready money, cash, and bonds, should pass to the wife by these words? It was contended, that the devise of all the testator's goods should carry all his personal estate; *omnia bona*, being words of the largest extent and signification, with regard to personals. To which it was answered, that if the devise of all the testator's goods were to be taken in so large a sense, it would disappoint the bequest of the residue, which could not be permitted; that it seemed reasonable the words "other goods" should be understood to signify things *ejusdem generis* with *household* goods, in order that the whole will might take effect; and consequently, that the testator's ready money, cash, and bonds, should not pass in this case by the word "goods," but belong to the residuary legatee. And of that opinion was Lord Chancellor *King*.

So in *Timewell* v. *Perkins*,(*y*) *C.* made the following bequest: "I give to *Mary Timewell* all mortgages, ground rents, judgments, &c.; *whatever I have or shall have at my death*, as plate, jewels,

(*x*) 3 P. Will. 112. (*y*) 2 Atk. 103.

linen, household goods, coach and horses, for her use; that no husband shall intermeddle therewith, and at her death to give them to whom she pleases." Question, whether goldsmith's notes and bank bills, passed to *Mary* under the above words? And by Lord *Hardwicke*, C.: "I am of opinion the goldsmith's notes and bank bills did not pass by the will to *Mary Timewell;* for though there is no doubt but the general words, *whatever I have or shall have at my death*, would have passed them; yet the particular words which follow, as plate, jewels, &c. confine and restrain them to things of the same nature; and so laid down in the case of *Trafford* v. *Berrige*."(*z*)

Upon the principle of the last cases, Lord *Hardwicke* determined the case of *Crichton* v. *Symes*;(*a*) in which *D.* bequeathed to *E.* all her goods, wearing apparel of what nature and kind soever, except her gold watch. *E.* claimed the residue under those words. But Lord *Hardwicke* was of opinion, that the words were not intended to be a residuary clause, as appeared from the circumstance of *D.* afterwards giving to her executor a legacy of 50*l.*; and that although it had been insisted against *E's.* claim, that the words wearing apparel explained *D.'s* meaning, as if she had said all my goods, *(to wit)* my wearing apparel; yet his Lordship said, that wearing apparel must be construed the same as, *and* wearing apparel; and it was his opinion, that as the words stood in the will, *D.* only intended to give her wearing apparel, ornaments of her person, *household* goods and furniture, and *no other* parts of her personal estate; and that the ornaments of her person were meant to be given, appeared as well from the latitude of the expression, "goods and wearing apparel," as from the *exception* of the gold watch. His Lordship therefore, decreed according to the opinion which he had expressed.

In the last case it is observable, that Lord *Hardwicke* considered it material, in showing the testatrix used the word "goods" in a restricted sense, that she afterwards gave a *money legacy* to her executor. This circumstance has also been dwelt upon in other cases, as clear manifestation of intention to confine the import of the term "goods," so as to prevent it passing ready money; and the construction appears reasonable and conclusive, that when a testator bequeaths to a person a money legacy, to whom he also bequeaths all his goods and other things in a particular place, he could not mean by those expressions to pass his ready money there, since he had already expressly given to the same person so much of that species of estate as he intended for him.

Thus in *Roberts* v. *Kuffin*,(*b*) *A.* bequeathed to his daughter "all *goods* and *things* of every kind and sort whatever, which should be found in her closet at his death." The question was, whether 45*l.* 0*s.* 7*d.* in money, found in the closet at that period, would pass to the daughter? And Lord *Hardwicke* said, that if this will had been construed strictly in law or equity, he was of opinion it would not have carried the 45*l.* and 7*d.* to the daughter; for in the outset of his will, he gave her a *money legacy*, which must be presumed to

(*z*) *Ante.* p. 198. (*a*) 3 Atk. 61.
(*b*) 2 Atk. 113. and see *Porter* v. *Tournay*, 3 Ves. 311. stated *infra.*

be the whole he intended her by way of money legacy; besides, said his Lordship, in the clause in dispute, goods were first named, therefore the subsequent word *things* must be confined to household goods, and to what was of the same species, for it would be unnatural to extend it to money. A closet, too, was a very improper place to refer to for money. The testator would have certainly mentioned cabinet, or bureau, or any other thing where money is usually kept, if he had intended a further bequest of money; but by referring to a closet, it is reasonable to believe he meant furniture only, which the daughter made use of in the closet.

With the last may be classed an *anonymous* case, reported in *Finch's* Precedents in Chancery,(*c*) in which *B.* bequeathed to his wife 1200*l.* in money and "all the goods and chattels, plate, jewels, and household stuff, and stock upon the ground, in and belonging to his house in *N.*:" in which house there was 400*l.* in money. The question was, whether this last sum passed to the wife under the above words? And it was decreed that it should not; for 400*l.* was a considerable sum of money, of which the testator could not be supposed ignorant; and that had he intended the money should have passed, he would not have connected it with the general words all his goods and chattels, but *at first* would have given to his wife 1600*l.*

The same principle upon which the last several cases were founded, produced Lord *Thurlow's* decree in the cases next stated; in which he decided, that a specific bequest of cabinet curiosities, *naming some of them*, as gems, medals, coins, &c. concluding with the general words, "and other valuable things," would not pass articles used or prepared to be worn by the testatrix, *viz.* ornaments of her person. But that those general words were to be confined to things *ejusdem generis* with those previously described.

The case alluded to is *Cavendish* v. *Cavendish*,(*d*) in which *A.* bequeathed to *B.* her collection or cabinet of curiosities, consisting of coins, medals, gems, and oriental stones, and *other valuable things*, hanging shelves, snuff boxes, bust of *C.* on the stair case, her *Florentine* cabinet of oriental stones in the second room, and the Japan cabinet in the bed chamber, formerly belonging to *D.* The question was, whether a diamond solitaire, a pair of ear-rings, a bow-knot, and some pearls, ornaments of *A.'s* person, passed to *B.* And it was in proof for *B.* that those articles were frequently shown as parts of *A.'s* cabinet, and included in the inventory of her curiosities. It was also in evidence against *B.'s* claim, that in trade a distinction in sense prevailed between the words "gems" and "jewels." That the latter meant precious stones *set* and *prepared for wear*, and the former, stones kept for curiosity only. The Master having reported that the above articles were occasionally worn by the testatrix, Lord *Thurlow* determined that they did not pass to *B.*; observing, that things to pass under the will must be *ejusdem generis* with those expressly devised; but that ear-rings and other ornaments of the person were parts of the personal estate, and *not specimens* of natural curiosities.

But although it be the settled doctrine of a court of equity, that

(*c*) Page 8. (*d*) 1 Bro. C. C. 467.

general and comprehensive expressions used in, or at the conclusion of a specific bequest of goods, plate, linen, furniture, &c. are to be restrained to articles *ejusdem generis*, with those particularly enumerated, and therefore not comprehending ready money or *choses in action;* yet since the presumed intention of testators is the basis of that construction, if their intention appear to include, by the general words, ready money or *choses in action*, the terms will have that effect. This may happen when the intention is made apparent by a testator excepting out of such terms of bequest a species of personal estate, that would not have passed by them, as has been mentioned, in observing upon the case of *Fleming* v. *Brook*.(*e*) In illustration of the above remarks, we shall refer to a decision of Lord *Eldon:*

In *Hotham* v. *Sutton*,(*f*) *A.* having two sons and a daughter, *B.*, *C.* and *D.*, after bequeathing for their benefits a sum of 12,700*l.* three per cent consols, gave all the residue of her personal estate and effects to her youngest children, *C.* and *D.* as therein mentioned. *A.* on the day of making her will executed a codicil, and revoked so much of her will as related to the bequest to her son *C.* of a share of her plate, linen, household goods, and *other effects* (money excepted,) and gave the whole thereof to her daughter. *A.* died, leaving her daughter and two sons, her only children; and at her death, and also at the date of her will, she was possessed of a leasehold house, and of several sums of money in three per cent consols, four per cents, and imperial annuities; also of money at her banker's, a debt secured on a promissory note, plate, jewels, and trinkets, household furniture, wearing apparel, books, a carriage, wines, and ready money. The question was, whether the daughter was entitled under the will and codicil to *all* the residuary personal estate except money, which depended upon the words, "other effects," in regard to the share of *C.* revoked by the codicil and given to *D.;* for if the words, "other effects" in the codicil were to be restrained as usual to property *ejusdem generis*, with the particular species described by the words preceding them, then *C.* would be entitled by the *will* to a share of all the residue, not consisting of plate, linen, and household goods. Lord *Eldon*, in deciding the question, expressed himself to the following effect:—"The doctrine appears now to be settled, that the words 'other effects,' in general mean effects *ejusdem generis*.(*g*) I cannot help entertaining a strong doubt whether this testatrix, if asked whether she meant effects *ejusdem generis*, or contemplated the share of all which she had considered her effects in the will, would not have answered that the latter was her meaning. Her expression is conclusive upon that. Money cannot be represented as *ejusdem generis* with plate, linen, and household goods. The *express exception* of *money* out of the other effects shows *her understanding*, that it would have passed by those words, that express words were required to exclude it; and by force of that exclusion in the excepted article, she says she thought the words of her bequest would carry things *non ejusdem generis*. This disposition must *therefore* be taken to comprehend *all that she has not excluded*, which is money only."

His Lordship determined that the residuary clause in the will was

(*e*) *Supra*, p. 196. (*f*) 15 Ves. 319. (*g*) *Rawlings* v. *Jennings*, 13 Ves. 39--46.

defeated by the codicil *in every respect*, except as to money, and that no part of the testatrix's stocks were excepted by the legal effect of the word money. We shall next proceed to consider,—

4. What will pass to specific legatees by the words "household furniture."

By the term "household furniture," all personal chattels will be included that may contribute to the use or convenience of the householder, or the ornament of the house, as plate, linen, china, both useful and ornamental, and pictures. To that effect, the *Master of the Rolls* expressed himself, and determined in the case of *Kelly* v. *Powlet*.(*h*) But for the same reason that under the words "household goods," it was determined (as has been shown) that goods or plate in the possession of a testator in the way of his trade would not be comprehended,(*i*) it is settled that such plate, goods or furniture will not pass to the specific legatee by the description of "household furniture." And it would seem that exception must also be made of such articles as are fixed to the building, and therefore pass as parts of the house.(*k*)

In *Le Farrant* v. *Spencer*,(*l*) *B.*, a captain of an *East India* ship, bequeathed to *C.* and *D.* 1000*l.* each, payable at twenty-one or marriage: and he gave to them "all his household furniture," linen, plate, and apparel whatsoever, and disposed of his residuary estate. The question was, whether the words "household furniture," &c. should include *all* plate, *India* and dimity goods, and some rough diamonds? Lord *Hardwicke* directed the Master to *distinguish* what goods the testator had for his own domestic use, and what for trade or merchandize: without which knowledge his Lordship said it was impossible to determine the extent of the bequest, which only included the former, according to the opinion of the House of Lords, in *Pratt* v. *Jackson*;(*m*) which degree was the stronger, because of the words "household stuff;" as also because it was a construction to be made of marriage articles, where the wife was a purchaser of what she was to claim; but that here the claim was merely voluntary.

Exceptions out of the words "household furniture" are *libraries of books*, whether great or small collections; because books being more collected for the improvement and entertainment of the mind than for ornament as furniture, are presumed not to have been intended to pass by the description of household furniture. *Wines*, too, are not included under such description, not falling within the natural meaning and usual acceptation of the words "household furniture," as also because their *use* being in *their consumption* it is inferred that testators never meant to comprehend such and the like articles in the term household furniture; the same rule of decision prevailing in this instance as we have seen adopted in the construction of the words "household goods."(*n*) These remarks are supported by the following authorities:

In *Bridgman* v. *Dove*(*o*) *A.* bequeathed in these words: "I leave

(*h*) Ambl. 605. See also, 1 Sim. & Stu. 189. *Cole* v. *Fitzgerald*, *infra*, p. 206.
(*i*) See *supra*, p. 191. (*k*) See *supra*, p. 195.
(*l*) 1 Ves. sen. 97. and see Ambl. 611. 3 Ves. 313. (*m*) Stated *supra*, p. 192.
(*n*) See *supra*, p. 192. (*o*) 3 Atk. 201.

my jewels, plate, pictures, medals, *furniture*, to my executors, to be equally divided; who insisted that under the word "furniture," *books* would pass. But Lord *Hardwicke* was of a contrary opinion, observing, that the consideration of the library being a small one, and therefore should pass as furniture, had no influence upon his mind, since great libraries were most frequently placed as ornaments, and were less accurately chosen than small ones.

Kelly v. *Powlet*,(*p*) the case next stated, is one of frequent reference upon the present subject. It is a decision that by the words "household furniture," plate, linen, and china, both useful and ornamental, will pass to the specific legatee, but not a library of books. It is also an authority that all plate belonging to the testator, (not purchased in the way of trade) suitable to his condition in life, will pass as household furniture, whether it had been used by him or not.

In *Kelly* v. *Powlet*, *B.* devised to *D.* her "household furniture" and farming utensils, which should be within or upon her house, lands and premises at *C.* at her decease; and she gave her residuary estate to *E.*, whom she made executor. *B.* died possessed of plate of the value of 1600*l.* and of *useful* and *ornamental* china, books, pictures and linen, all of which were in her house at *C.* and and were possessed by *D.*, who claimed them under the above legatory words; but the only questions decided related to the plate, books, linen, and china. It was in evidence, adduced by *D.*, that all the linen in the house (except a parcel) were in *common use*, and not more than sufficient for the family. That such parts of the china as were useful had been in common use, and that the ornamental parts of it were placed over chimnies, doors, and upon cabinets, and that the whole was not of considerable value. It was also proved that a room had been converted into a library, in which was a number of books, though not valuable, as it was said they principally consisted of novels, &c. The *Master of the Rolls*, after observing that the principal question related to the plate, expressed his opinion that it passed by the words "household furniture." He said he knew not any case determined on those words only; that there were always other *circumstances* considered, and which might be so various as to occasion different, and even contradictory determinations, *viz.* that in one case, "household furniture" might pass plate, and that in another it might be excluded. With respect to the necessity of the plate being in *use* in the family, his Honour thus expressed himself: "The rank and quality of the person possessing it will occasion the determination one way. If a person of rank buy a service of plate suitable to his quality, and *never use* it, yet I think the plate would pass by the words 'household furniture.' I cannot agree it is a rule that plate will not pass unless *used* as such by the testator. There is no such general rule. The question always depends upon circumstances, and never was determined by the plate being used or not. I do not in my opinion rely upon the circumstance of the plate being in common use. *B.'s* keeping her chamber, and not using the plate during that period, would not be an exemption, nor would any other occasional *non-user*. To make *non-*

(*p*) Ambl. 605. and approved of in the next case.

user an exemption must be a case like that of *Le Farrant* v. *Spencer*,(*q*) where the testator bought the plate to trade with." As to the books, his Honour said he was not satisfied that *B.* did not intend every thing within the house should pass; but as the resolution of the Court had been, that books did not pass by the words "household furniture," he must determine so in this case. And he further declared, that the linen and the china, both useful and ornamental, belonged to *D.* as also the pictures hung up(*r*) and in cases, in pursuance of *E.'s admission.*

The last case was followed by *Porter* v. *Tournay*,(*s*) in which it was determined that *wines* as well as books did not pass by the words "household furniture."

In that case, *C.* bequeathed in the following manner: "*D.* to have the use of the house I now live in, with all the furniture and stock of carriages and horses, and other live and dead stock, during her life, and 200*l.* a year out of the residue of my fortune." The question was, whether *D.* was entitled to any, and what interest in *C.'s books*, and his stock of *wines?* And Lord *Alvanley*, M. R. decided that *D.* had no interest in either of them, and observed that this not being an absolute, but a limited interest in the articles, *viz.* to *D.* for *life*, it was naturally to be supposed that such of them as are consumed in their use, were not intended to be included, and that words are not to be extended to such articles, unless they clearly embraced them. His Honour referred to, and approved of the last case, and declared that *D.* was not entitled to, or to the use of the books and wine.

In the above case, *C.* was possessed of *plate*, in respect of which there was no question, as the residuary legatee of *C.* yielded the point in favour of *D.* upon the authority of *Kelly* v. *Powlet.* Yet, although in general plate, as we have seen, will pass under the words "household furniture," still the particular circumstances of a case may, by abridging the natural import of the expression, prevent it extending to plate. This has happened when a testator bequeathed part of his plate by that term, from which it was inferred, that such a legacy afforded sufficient evidence of intention that he did not mean to pass any of that species of his property by the description of "household furniture." The principle is that before mentioned,(*t*) which produced the decisions that the bequest of a *money* legacy to the specific legatee "of all the testator's goods in his house," should prevent that word passing ready money there, which it would otherwise have done.

Thus in *Franklyn* v. The *Earl of Burlington*,(*u*) *D.* bequeathed to the following effect: "My will and pleasure are, that the furniture and pictures *in* my houses, *B.*, *C.* and *E.* shall always remain there, and not in the power of my executors to dispose of, but shall go with my said houses to such of my grand-children as shall be in the possession thereof." *D.* then directed that the plate gilt with gold, belonging to his chapel at *F.* together with the ornaments, should remain to the perpetual use of the chapel; and he appointed *G.* executor, to whom he bequeathed all his personal estate not

(*q*) See *supra*, p. 200. (*r*) See 2 Ves. sen. 279. (*s*) 3 Ves. 311.
(*t*) See *supra*, p. 198. (*u*) Prec. Ch. 251.

before given. The question was, whether the plate which *D.* constantly used, and which he took with him upon removal from one house to another, belonged to the residuary legatee, or passed under the word "furniture" to the owners of the three houses? And it was the Lord Keeper's opinion, that although that word would embrace plate, yet it would not do so in the present case, not only because *D. distinguished* the chapel *plate* from the *furniture*, but also because the testator expressed his intention that the particular furniture of each house should go and be enjoyed with the house to which it belonged, and that therefore the plate removed at different times from one to another with *D.* could not with propriety be said to be the furniture of one house more than that of the other, so that the plate could not be within *D.'s* contemplation, when he used the word "furniture." The plate was accordingly adjudged to the residuary legatee and executor. Such, in substance, appear to have been the reasons of his Lordship's decree, and they seem sufficient to have authorized it; so that the accuracy of this case, very briefly reported by Mr. *Vernon*, who ascribes to the Court a contrary judgment, may be reasonably doubted.(*x*)

With respect to the words "household stuff," every thing will pass by them to the specific legatee, which may be used for the convenience of the house, as tables, chairs, bedding and the like;(*y*) but apparel, books, cattle, victuals, *choses in action*, &c. which do not naturally fall within the import of the term, will not be included in or pass by that description, except the context of the will clearly show a contrary intention, of which an instance occurred in the case of *Hotham* v. *Sutton*, before stated.(*z*)

In the case of *Cole* v. *Fitzgerald*,(*a*) Sir *John Leach*, V. C. decided, that the words "household furniture and other household *effects*, of or belonging to the testator's dwelling-house and premises at his decease," comprised all property in the house or on the premises intended for use or consumption therein, or for ornament thereof; and that it included pistols, apparatus for turning, models, pictures, organ, parrot, books, wine and liquors; but not a poney, cow, or fowling-pieces, unless it was proved they were kept for the defence of the house. If the hay stack was only for use, it would pass, if for sale, it would not.

As to "chattels," the word, according to Sir *Edward Coke*,(*b*) is of French extraction, and signifies goods; but *Blackstone*, in his Commentaries,(*c*) prefers the derivation of the term from the technical Latin word *catalla*, which *primarily* signifies beasts of husbandry or cattle only; but its *secondary* sense was applied to all moveables generally. He also observes, that in the grand *Coustumier* of Normandy,(*d*) a chattel is described to be a mere moveable, but at the same time is set in opposition to a fief or feud, so that it comprised not only goods, but whatever was not a feud.(*e*) Now, a fief or feud possesses two requisites, *viz. immobility* and *unlimited or uncertain duration* as to time; whence it follows, that whatever species of property wanted either of those qualities, was not a feud

(*x*) 2 Vern. 512. (*y*) Swinb. pt. 7. sect. 10. p. 484.
(*z*) See *supra*, p. 202. (*a*) 1 Sim. & Stu. 189.
(*b*) 1 Inst. 118, b. (*c*) Vol. II. 385. (*d*) Chap. 87. (*e*) Fol. 107. a.

or fief, and according to us is not real estate; for our law has annexed the same extensive meaning to the word chattels as the *Norman* law has done; so that whatever property does not fall within the description of fief or real estate, must be either personal estate or chattels. From the above definition of the term "chattels," it naturally occurs that the division must be two-fold, *viz.* into *chattels real* and *chattels personal.*(*f*) The former are such interests created in lands, which want the unlimited or uncertain duration before mentioned, as terms for years, estates by statute merchants, &c. The latter consist of mere moveable property, as goods, money, and the like. Hence we may infer, that a bequest of all the testator's chattels in the parish of *A.* will be competent to pass not only his moveable or personal property, except *choses in action*, but also such interests in lands, less than freehold, to which he may be entitled in that place.(*g*) This word, however, must be construed by the context of the will, so that if the bequest be of chattels, or goods and chattels in the testator's house, the word "chattels" will only pass such articles and property as belong to the house and are detached from it, and in possession and not in action, and will receive the like construction as the word "goods," which has been before discussed.(*h*)

We shall next consider the import of the expressions "Live and dead stock."

The words "live and dead stock" have never occurred alone in a bequest, consequently their import in the abstract could not have received a legal interpretation. Since, however, the term *stock* is of extensive meaning, and not rendered less so by the prefatory words "live and dead;" expressions that merely distinguish such part of the personal estate as is inanimate from that which is animate; it is not improbable that a court might interpret the word stock, under those circumstances, as synonimous with property, and sufficient to pass the whole of a testator's personal estate. It is also observable, that the term stock accords with most of the personalty which a person can die possessed of; as stock of wine, of linen and china, of cattle, corn, &c. Hence a rational inference arises, that when a testator, in disposing of his personal estate, expresses himself by the only words "all my live and dead stock," he used those terms in the sense of embracing the whole of his personal property not otherwise bequeathed.

But we are supplied with a decision, that when the words "live and dead stock" are preceded by others showing that the testator disposed of all the in-door property which he intended to give to the legatee, but by the effect of which words some of the personal estate in his house would not pass, that intention will prevent the subsequent expressions "live and dead stock" applying to the property within doors, so as to include such part of it as did not pass by the preceding words; and will confine those expressions to personal property out of doors, upon the same reasoning (as before appears,)(*i*) that a money legacy to *B.* who is also specific legatee of the testator's household estate by the words "all the goods in my house at *A.*" will exclude *B.* from taking *ready money*, under the

(*f*) 1 Inst. 118.
(*g*) Swinb. pt. 7. sect. 10. p. 475.
(*h*) See *supra*, p. 189 *et seq.*
(*i*) See *supra*, p. 199.

description of "goods," which might be found there at the testator's death.

The case alluded to is *Porter* v. *Tournay*.(*k*) The words of the bequest were, "The aforesaid *D.* to have the use of the house I now live in, with all the furniture and stock of carriages and horses and *other* live and dead stock" during her life. The question was, whether under any of those words *D.* was entitled to the testator's books and his stock of wines, valued at 150*l.*? It has been shown, that the word furniture would pass neither of these kinds of personalty.(*l*) In consequence it became necessary to consider whether the terms "live and dead stock" would have that effect. And Lord *Alvanley*, M. R. thus expressed himself: "The *whole* is *qualified*. I do not mean to say what live and dead stock might mean if the words stood independent of every thing else; but upon the *whole* of this will, I cannot, by any fair inference, deduce that the testator did intend, under the words live and dead stock, as they stand here, his books and wine. Consider what would have been the interpretation of these words if nothing at all were said of furniture. No person could have conceived that those expressions, preceded by carriages and horses, would have meant in-door stock, furniture, &c. which, though dead, could not be coupled and enjoyed with carriages and horses. It is clear, therefore, that if those words stood alone, the interpretation would be out-of-door stock. They would mean corn, hay, straw, carts, &c." His Honour determined that the books and wine did not pass, observing that by the word *furniture*, the testator disposed of every thing he intended *in* the house, and that by the other words he only meant *out-of-door* stock.

But it may be deduced from the judgment in the last case, that the intention inferred from the words accompanying "live and dead stock" would have been repelled, and that the books and wine would have passed if the testator had added to those expressions the words "in-door and out;" for then his meaning to dispose of every thing, both within and out of doors, would have clearly appeared, as in the case of *Gower* v. *Gower*(*m*) as before stated.(*n*)

In a recent case a question arose as to the passing of "live stock" under one of two clauses in a will. The case was *Randall* v. *Russell*,(*o*) in which *A.* by the first clause bequeathed all his household furniture, goods, plate, linen, china, books, pictures, implements and utensils of household, and all such wines, liquors and provisions as should be in and about his house at his death, and also all his *stock* of *cattle*, horses and carriages, and also the harness, furniture and trappings thereto belonging, to *B.* absolutely. And by the second clause, which immediately followed, *A.* gave all his messuage or tenement, with the farm and lands (and *stock* and *crop* thereon) called *L.* &c. to the said *B. durante viduitate*. The question was, under which of those clauses the *live* stock upon *A.'s* farm was comprehended? And Sir *William Grant*, M. R. decided, that such stock passed to *B.* absolutely under the first. *B.'s* opponents insisted that the live stock used upon the farm did not pass to her absolutely under the words "stock of cattle and horses," but only for life under

(*k*) 3 Ves. 311. stated *supra*, p. 205. (*l*) *Ante*, p. 205.
(*m*) Ambl. 612. (*n*) See *supra*, p. 195. (*o*) 3 Meriv. 190.

the word stock in the second clause. That, said his Honour, was a strong proposition, for it was asserting, that by the words "stock on the farm," cattle and horses were more properly designated than by the *very* words, cattle and horses. That if *A.* had spoken of horses only in conjunction with carriages, he might have been supposed to have meant carriage horses and not farm horses; but that he gave not merely his cattle and horses, but all his *stock* of cattle and horses; unless, therefore, it could be contended that *A.'s* farm stock was not his stock, or that all his stock meant something less than his whole stock, his Honour said that he could not see how *B.'s* opponents could succeed in their claims.

In the last case a point arose as to the nature of the interest which *B.* took as tenant for *life*, in articles of which the *use* consisted in their *consumption*.(*p*) There was no decision, but the Court gave a strong opinion, that a bequest for life, if specific, of things *quæ ipso usu consumuntur*, is a gift of the *property*, and that there cannot be a limitation over after a *life* interest in such articles, but that the old rule should be revived of a gift for life of a chattel being an absolute disposition of it. The point, however, still suspends in doubt, as at the time when Lord *Alvanley* determined the preceding case of *Porter* v. *Tournay*. What the decision may be when the question comes before the Court, and is maturely considered, it would be rash to anticipate, but these reflections occur upon considering Sir *William Grant's* opinion; if, as admitted, articles of the above description, when included in a *residuary bequest*, are to be sold, and the *interest* to be enjoyed by the tenant for life, and the capital to belong to the person in remainder, in order to effectuate the intention of the testator; it is difficult to assign a satisfactory reason why the same method should not be adopted when they are *specifically* given to a person for life, and afterwards to another. The intention is the same in both cases, viz. to divide the things between the tenant for life and the person in remainder; and why that intent should be attended to in the one case, and not in the other, does not appear. The opinions therefore, of the learned Judges referred to by Lord *Alvanley* in the case last mentioned, that the articles must be sold, and the *interest* of the money enjoyed by the tenant for life, seem entitled to great consideration; and although he thought them *very rigid*, yet other persons may consider the contrary construction attended with greater hardship, as tending to defeat the interest of the person in remainder, and the intention of the testator.

As to what will pass by the terms "stock upon a farm," it would seem that not only all *moveable* property upon or belonging to the farm will be included, but crops of corn *standing* upon it at the testator's death. This was first decided by *Holt*, C. J. in *Cox* v. *Godslave*,(*q*) in which *A.* bequeathed to *B.* for life the farm *C.* in the occupation of *A.*, with remainder to *J. S.* He then gave to *B.* all his goods and chattels, plate, and household goods, *stock of his farm*, (including *C.*,) bonds, bills, book-debts, and all other his moveables for life; and appointed *B.* and *D.* executors. *B.* survived the testator, but afterwards dying before severance of the crops of corn stand-

(*p*) 3 Meriv. p. 194.

(*q*) Cited 6 East. 604. *in notis.*

ing and growing upon the farm at the testator's death; the question was, whether those crops belonged to *J. S.* the devisee of the land, or had become vested in *B.* under the terms of the bequest of *stock*, &c. and consequently belonged to her personal representative? And it was determined in favour of the representative of *B.* as express legatee of them, by the words of the above bequest, although it would have been otherwise if *B.'s* title had solely depended upon her character of *executor*.

The last case was followed by that of *West* v. *Moore*,(*r*) in which *A.* devised to *B.* several estates, then in *A.'s* own occupation. He afterwards bequeathed to his executors all his money, securities for money, household goods, furniture, plate, china, linen, and *stock upon his farm*, with the implements of husbandry, and all other his personal estate of what nature or kind soever, in trust to sell and to apply in payment of his debts, funeral and testamentary expenses and legacies, and to pay the surplus (if any) as *A.* by codicil should appoint. At his death there were growing upon the estates devised to *B.* several crops of wheat, oats, beans, and peas. The question was, whether they passed to the devisee of the lands, or to the executors under the words of the bequest? And Lord *Ellenborough* and the rest of the Judges of the Court of *King's Bench*, decided that the crops belonged to the executors; a decision founded upon the authority of the preceding case of *Cox* v. *Godslave*.

Although the expressions "stock upon, or belonging to my farm," generally mean stock in husbandry, they may nevertheless also extend to, and pass stock of a different description, when the intention clearly appears that they should do so from the words of the bequest, as happened in the case *Brooksbank* v. *Wentworth*;(*s*) in which *A.* bequeathed to *B.* for life, all his household goods, cattle, corn, hay, implements of husbandry, and *stock* belonging to his house, messuage, farm, and premises; and also such messuage, farm and premises. Lord *Hardwicke* determined, that a malt house being included in the lease, the stock in the malt trade passed to *B.*; for his Lordship considered that as the words of the bequest extended to *all stock* belonging to the house, farm and premises comprised in the lease, the malt house being so included, the stock used in the malt trade necessarily, and in unison with the testator's intention, passed to *B.*

With respect to the word "effects," it is equivalent to "property" or "worldly substance." Standing alone, therefore, or unconnected with particular species of chattels, it will pass the whole of the testator's personal estate;(*t*) but when it is preceded and connected with words of narrower import and the bequest is not residuary, it will be confined to species of property *ejusdem generis* with those previously described. An instance of this occurred in *Rawlings* v. *Jennings*.(*u*)

In that case *A.* bequeathed to his wife *B.* an annuity of 200*l.* part of money he then had in bank security; and thus proceeded; "toge-

(*r*) 8 East, 339.

(*s*) 3 Atk. 64. Ed. by Sanders.

(*t*) 15 Ves. 507. Cowp. 304. 6 Mad. 119, *Hearne* v. *Wigginton*. *Henderson* v. *Farbridge*, 1 Russ. 479.

(*u*) 13 Ves. 39-46. See also *Sutton* v. *Sharp*, 1 Russ. 146.

ther with all my household furniture and 'effects' of what nature or kind soever that I may be possessed of at the time of my decease." The residuary personal estate, being otherwise undisposed of, was claimed by *B.* under the words "effects," &c. But Sir *William Grant* determined that the claim could not be sustained, observing that as *part* of the property was particularly given to *B.* the word "effects" must receive a more limited interpretation, and must be confined to articles *ejusdem generis*, with those specified in the preceding part of the sentence, viz. household furniture.

But in *Campbell* v. *Prescott*,(*x*) the Court would not confine the import of the word "effects" to articles *ejusdem generis* with those preceding it, and for the reasons after mentioned. There the bequest was of "all the testator's sugar-house, cupola, and merchandize, stock with jewels, plate, household goods, furniture, and *all effects whatsoever*." The next of kin claimed the general residue as undisposed of, there being no other words to comprise it. But the same Judge, who decided the last case, determined, that the surplus passed by the word "effects."

It is obvious that the terms of the above bequest were *residuary*, and that the testator meant to make a general disposition of his personal estate, in doing which, he, (as is usual,) merely enumerated some of its particulars, concluding in the extensive language of "all his effects whatsoever." There was no reason, therefore, in this, as there was in the preceding case, to restrain upon inference of intention the natural import of the term "effects," to particulars *ejusdem generis* with those previously enumerated.

A similar instance occurred in the case of *Michell* v. *Michell*.(*y*) There the testator devised to his two daughters a house and premises; also, a garden and orchard, and "all his plate, linen, china, household goods and furniture, *and* effects that he should die possessed of;" making no other disposition of his general personal estate. The Court held that the word effects was in a sense detached from the preceding parts of the sentence, and was used by the testator to include the *whole* of his personal property. Or in other words, the testator adopted the term "effects" as the most comprehensive expression he could devise to include the disposition of all his personal estate.

As to what will pass to a specific legatee by the word "utensils," it should seem that the expression will embrace every thing which is necessary for household purposes, or applicable to the trade or mystery, to which the term has reference. In Dame *Latimer's* case, shortly reported in *Dyer*,(*z*) it appears to have been the opinion of the Judges that *plate* or *jewels* would not pass by that general term. The principle must have been, that plate being a luxury, did not fall within the ordinary use and acceptation of the word utensils; a reason which equally applied to jewels, that were ornaments, and of great value, and more suitable to the person and dress of the inhabitant, than for the necessary occupation of the dwelling house. It is, nevertheless, presumed, that if a testator clearly showed an intention to include plate and jewels in the word "utensils," they would

(*x*) 15 Ves. 503--507. (*y*) 5 Madd. 69--71. (*z*) P. 59. pl. 15.

pass by it.(*a*) Suppose then he bequeathed to *B.* "all the utensils in his house, *except* his silver tankard and his diamond ring." By the exception, it manifestly appears that he meant to give such of the same kinds of property in the house as were not excepted, so that it is conceived upon the principle of *Hotham* v. *Sutton*,(*aa*) that all the other plate and jewels would pass to *B.*

The term "money" will include bank notes, (which are considered money,) ready money, and probably notes payable to *bearer*, and Exchequer bills and bills of exchange, *indorsed in blank*, for the reasons before stated,(*b*) but not choses in action, as bonds, &c. or receipt for government stocks. Accordingly, in a bequest of all the testator's money *in his house at A.*, bank notes and ready money will alone pass, although he may leave in it mortgages, bonds, or receipts, for government annuities.(*c*) Nevertheless, if it appear from the context of the will, that the testator intended by the word "money," to include securities for money, it is presumed, for the reason stated in considering the import of the word "utensils," that such intention will prevail, and the securities pass accordingly.

Public stocks or funds will, it should seem, from the case of *Bescoby* v. *Pack*,(*d*) pass by the words "securities for money;" but it appears doubtful whether they would include bank stock, that being property wherein the owner is interested as a partner in a public trading company.

The case of *Dicks* v. *Lambert*,(*e*) was cited in *Bescoby* v. *Pack*, but seems not to have removed the doubt upon the mind of Sir *John Leach*, V. C. In that case the testator bequeathed to his nephews and nieces, who should be living at his wife's death, 50*l.* a piece out of the *securities* he then had by him. At his death the testator was only possessed of 3800*l.* *four per cent* bank annuities, a mortgage for 140*l.* and 20*l.* upon bond, which could be called securities: the mortgage and bond being insufficient to pay all the legacies, Lord *Loughborough* held that under the word "*securities*," the testator had included the bank annuities.

And as to "medals," what will pass by the word to a specific legatee, besides pieces of metal answering the literal description, it should seem that if *current* coin be curious pieces, and are usually kept with medals, the coin will pass with them under the description of medals, since medals, or at least some of them, were once current coin; and to that effect Lord *Hardwicke* expressed himself in the case of *Bridgman* v. *Dove*.(*f*)

By the word "debts," whatever property falls within the description of a debt, will pass to the legatee; as money owing to the testator on bonds, notes, mortgages, &c. The time to which the legacy refers is material, for if the bequest be of "debts due and owing at the testator's death," the obligations then due, and answering the description of debts, will pass; and the interest of the legatee cannot be disappointed in any of them, by a subsequent act of a debtor, under his engagement to perform a particular duty. In illustration

(*a*) *Fitzgerald* v. *Field*, 1 Russ. 427. (*aa*) 15 Ves. 319. stated *ante*, p. 202.
(*b*) *Supra*, p. 191.
(*c*) *Supra*, p. 190, *et seq.* and see *Downing* v. *Townsend*, Ambl. 280.
(*d*) 1 Sim. & Stu. 500. (*e*) 4 Ves. 725. (*f*) 3 Atk. 202. stated *supra*, p. 203.

of this: If *A.* bequeathed all his ready money and *debts* due and owing to him *at his death* to *B.* and he afterwards lent to *C.* 3500*l.* navy *five per cents* upon security of his bond, to replace the stock on a particular day, and to pay the intermediate dividends. If the bond were forfeited during *A.'s* life, and he died before the stock was replaced, *B.* would be entitled to the benefit of the bond; because, by the forfeiture of the condition, a debt became due from *C.* to *A.* which was owing at *A.'s* death; and the circumstance that *C.* might still transfer the stock, could not alter or affect the rights of the parties. So it was determined by Sir *William Grant*, M. R. in the case of *Essington* v. *Vashon*;(*g*) from whose judgment this inference arises, that sums of money only, which are actually *due* and *payable at the testator's death*, fall within the description of *debts* due and owing to him at that period; so that if the condition of a bond or mortgage were not broken during the life of the testator, the money secured by either, would not pass, as not answering the description of a debt *due* to him at his decease.

The word "debts" may be confined to particulars when the intention is sufficiently apparent from the will, to give only sums of money owing upon particular securities; as in the instance of a gift "of the debts owing by *B.* to the testator at his death, *viz.* such as shall be due on bond or mortgage;" for the *viz.* clearly shows the qualified sense in which the general words were used.

But in the case next stated, Lord *Eldon* expressed a decided opinion, that if a bequest were of "the debts due at the testator's death from *C.* whether by bonds or mortgages, or open accounts," debts only so secured would pass to the legatee,(*h*) although the form of bequest does not seem inconsistent with the intent to give all the debts by the general words, as in the instance before given, since the enumeration might be made *ex abundanti cautelâ*.(*i*). Yet, supposing that opinion on such a case to be correct, if, from other parts of the will, a clear intention appears, that notwithstanding the enumeration of the particular securities, the testator meant to give all debts of every kind and description which *C.* should owe him at his death, then full effect will be given to the word "debts," and the legatee will be entitled to whatever sums of money, falling within the description, were due from *C.* to the testator at the death of the latter.

An instance of this occurred in *Stenhouse* v. *Mitchell*,(*k*) where *A.* by the tenth clause of his will, bequeathed to *B. all the debt* which should be owing to *A.* from *C.* of *Bellfield* estate, on the 1st day of *January* 1794, *whether by bond, mortgage, or open account*, charged with the payment of 100*l.* a piece yearly, to *D.* and *E.* if such debt did not exceed 8000*l.* or that *D.* and *E.* should have a quarter of the interest on whatever sum might be due by *Bellfield* estate. By the eleventh clause *A.* gave to his six nephews the debts which should be due to him at his death, *whether by mortgages, bonds, or open accounts*, by *J.* and other persons, owners of certain specified lands, subject to the payment of legal interest on the sums owing by those estates. And by a subsequent clause *A.* gave *all the*

(*g*) 3 Meriv. 434.
(*h*) 11 Ves. 356.
(*i*) See observations, *infra*.
(*k*) 11 Ves. 353.

debt which should be owing from the said *C.* of *Bellfield* estate, on the 1st day of *January* 1796, instead of the 1st of *January* 1794, to the said *B.* to whom he mentioned that debt was given on *B.'s* paying to *D.* and *E.* a fourth part of the legal interest of the sum such debt might happen to be at *A.'s* death. The question was, whether the legatees under the eleventh clause were entitled to *judgment* debts and other debts which did not accord with the terms of the bequest? And Lord *Eldon* determined in the affirmative, observing, that upon the subsequent or last clause, with reference to the debt in the tenth clause, the testator himself had said (in omitting the words, "whether by bond, mortgage, or open account,") that when he gave debts, whether due by mortgage, bond, or open account, speaking of debts due *by* estates, he meant *all* the debts those persons whom he named should owe him at the period to which he referred; in that clause of 1794 and 1796, and in the other at his death.

In deciding the last case, Lord *Eldon* thought it necessary to call in aid the context of the will, and was of opinion (as before appears) that if the subsequent or third clause had been omitted, he must have determined that the word "debts," followed by the specification of the particular securities, was confined to property actually due upon mortgages, bonds, and open accounts. That was however only opinion, but it is presumed that the manner in which the specification was made, so far from showing an intention to restrain the generality of the word "debts," seemed to have been inserted from an anxiety to include every debt that might be owing from the debtors. His Lordship's opinion therefore, might be doubted upon principle, in the absence of authorities to the contrary; but when the case of *Bridges* v. *Bridges*,(*l*) and *Chalmers* v. *Storil*,(*m*) are considered, it will appear difficult to support that opinion. In the first case, the testator gave the remainder of his estate, viz. his *bank* stock, *India* stock, and *south sea* annuities;" Lord *King* held that not those particular funds only, but the whole residuary personal estate passed; the specification not being added in a restrictive sense, but as an enumeration of the *chief* particulars of which the estate consisted. And in the second case, the testator gave all his real and personal estate to *B.* &c. and then enumerated the property bequeathed, as consisting of freehold ground rents, money on mortgage, American bank stock, &c. And Sir *William Grant*, M. R. determined upon the authority of the last case, and the intention of the testator, that the *whole* personal estate passed to the legatees. So that in the case of *Stenhouse* v. *Mitchell*, the intention being clear, (as admitted by Lord *Eldon*) to give *all* the debts which should be due from the persons named, the principle of the two last stated cases, seems to apply to it, and to have authorized a decision, without the context of the will, that all those debts, however secured or owing, passed to the legatees.

The bequest of a debt or sum of money due upon a particular security, will pass the *capital*, and not arrears of interest owing at the testator's death; for the description merely embraces the principal money.

(*l*) 8 Vin. Abr. tit. "Devise," 295. pl. 13.
(*m*) 2 Ves. & Bea. 222. and see *Williams* v. *Williams*, stated *infra*, sect. 4.

This was determined by Lord *Hardwicke* in *Roberts* v. *Kuffin*,(*n*) where *A.* bequeathed to *B.* 200*l.* secured by a mortgage on the estate of *C.* and all the messuages, &c. for securing the same. His Lordship said that the devise entitled *B.* to the principal only of the mortgage, and not to the interest accrued from the date of the will. And he put a case of the bequest of 300*l.* due upon a bond; which, said his Lordship, would not carry the interest incurred in the lifetime of the testator.

Since, then, a specific legacy of a debt will not pass arrears of interest, it is a consequence, that the bequest of *arrears* of a debt will not pass the *principal* money, as the term arrears is more applicable to interest than capital; so it was considered by Lord *Rosslyn* in *Hamilton* v. *Lloyd*.(*o*)

In that case the testatrix having a mortgage for 4000*l.* upon the estate of *B.* who was tenant for life; and also having his bond for 120*l.* arrears of interest, bequeathed "to *B.* the *arrears* of her mortgage upon his estate, likewise a bond from him in her possession to be delivered to him." The question was, whether the *principal* of the mortgage was included in and passed by the above description? And his Lordship decided in the negative, observing that the *arrears* of a mortgage did not mean the mortgage itself, but what might be due at the death; that the words were insufficient to pass the mortgage, and that it was only the testatrix's intention to relieve *B.* from his debt incurred for interest.

We shall now consider what will pass by the words "linen and clothes."

The term "linen," without qualification, will comprise table and bed linen, and every article to which that general word can be applied. But if it be accompanied with the word "clothes," a term merely comprehending body linen, that kind of linen only will pass, as was decided in the case of *Hunt* v. *Hort*.(*p*)

With respect to the import of the word "farm," if a testator specifically bequeath in this manner; "all the farm held by me on lease from *A.*;" all lands and tenements held and enjoyed under such lease will pass to the legatee. And if the testator descend to further particulars, and devise thus, "all that my farm called *C.* and now in the occupation of *A.*" but part of it happens to be in the occupation of *B.*; the whole of the farm will nevertheless pass under the first words, because it is the obvious intention that all the lands, parcels of farm *C.* should belong to the devisee, in whose occupation soever they might be; the latter expressions being words of suggestion or affirmation, and not of restriction or limitation. *Parol* evidence also is admissible to ascertain of what parcels the farm consists, and to show that some of them were in the occupation of *B.*

These points were decided in the case of *Goodtitle* v. *Southern*,(*q*) in which *A.* devised in the following words: "I give all that my farm, lands, and hereditaments, called *Trogues farm*, situate within the parish of *D.* in the county of *D. now in the occupation of C.* unto *B.* &c. At the date of the will, the farm was in the occupation of *C.*; but two closes, the subjects in dispute, were in the oc-

(*n*) 2 Atk. 112.
(*o*) 2 Ves. jun. 416.
(*p*) 3 Bro. C. C. 311.
(*q*) 1 Maule & Selw. 299.

cupation of *M.*; they having been previously occupied with the farm, but let by *A.* to *M.* before the will was made. And in order to show that *A.*, when he made his will, considered the closes as parcels of the farm, a notice to quit was proved, which had been given to *A.* by *M.* a few months before the date of the will; by which *M.* was required to deliver up possession of all *A.'s* lands, *belonging* to and called *Trogues farm*, in the parish of *D.*, *then in M.'s possession*, on, &c. The question was, whether the two closes in the occupation of *M.* passed to *B.*, and whether the notice could be received in evidence to prove those closes to be parcels of the farm? And the Court of *King's Bench* decided both questions in the affirmative. Lord *Ellenborough*, C. J. observing, that parcel or no parcel was always a question of evidence for a jury; and that therefore it was competent to show, in the present case, if there were any doubt, that the two closes were parcel of *Trogues farm*, by which name the thing was sufficiently ascertained: That the testator contemplated them as parcel of the farm, appeared from the notice to quit; and that if they were so, the word "all" in the devise would not be satisfied by their exclusion: That although the testator was mistaken as to the person in whose occupation the two closes were, the error was harmless, since the devise was sufficiently comprehensive; and it was clear that he meant to pass all which was called *Trogues farm*, and which was a plain and certain description: and that the *defective description* of the *occupation* would not alter the devise.

The reader will find other cases upon the present subject collected in note(*r*); from which he will be able to form a judgment when a defective description of the occupation will and will not be restrictive of the words preceding it.

It has been before stated, under what words PLATE will pass when it is not mentioned by name; but it remains to be considered what will be comprehended under that term.

The usual acceptation of the word "plate" is wrought gold or silver; consequently all gold and silver, or silver gilt, will be included in that word. But things which are only washed with gold or silver are not to be looked upon as plate; for the gold or silver used in the manufacture is trifling and secondary; the chief ingredient in the composition consisting of base metal. Still instances may occur in which plated articles will pass under the description of plate. Suppose *A.* to bequeath his plate to *B.*, and to possess nothing which can possibly fall under the denomination of plate, except plated goods, they will pass to *B.*; for it is clear that the testator meant to pass them as plate. But if *A.* had also proper plate, then it is presumed that the plated articles would not pass, unless a contrary intention appeared from the context of the will; and such an intention may be shown by *exception* of a plated article out of the bequest of the plate, as appears from similar instances before produced in this section.(*s*)

(*r*) *Roe* v. *Vernon*, 5 East, 51–79. *Doe* v. *Greathed*, 8 East, 91–103. *Goodright* v. *Pears*, 11 East, 58. *Doe* v. *Earl of Jersey*, 1 Barn. & Ald. 550–557. and *Down* v. *Down*, 7 Taunt. 343.

(*s*) *Ante*, pp. 193. and 200.

The subject next to be considered is,—

SECT. II. What will pass to a Specific Legatee under a general bequest of personal Estate in the Colonies.

Since, as before observed, the effect of a bequest of personal property in a particular place is to pass that property only of the testator in the place described either at the date of his will or at his death, according to the terms of the disposition,(*t*) and it being a rule that the latter is to be considered the period, (except an intention to confine the operation of the bequest to the making of the will clearly appear,(*u*) it follows that if *A.* bequeath all his personal estate *in Jamaica* or in the *East Indies* to *B.*, and remittances are afterwards made to *England*, and invested in the *English* funds, or are intended so to be, or upon some other security; the stock or money remitted, although consisting of colonial property, will not pass to the specific legatee; because it was not at the testator's death in the place mentioned in the will, and therefore does not answer the description of the bequest. To exemplify this by authorities.

A. specifically bequeathed the residue of property in *Jamaica* to his executors to sell, and to remit to *Great Britain*, &c. the proceeds and all other monies belonging to his estate. It appeared that *B.* and *C.* were indebted to *A.* prior to his will, by judgments obtained in *Jamaica*. *A.* not being satisfied with those securities, authorized *D.* by letter of attorney, to sue for and receive all debts owing to him in *England;* under which *D.* took in *England* a bond from *B.* (who had left *Jamaica* and come to reside in this country), payable to *A.* by instalments, for what was owing on the judgments from *B.* and *C.* to *A.* *D.* also entered up *judgment* in the Court of King's Bench here, upon the warrant of attorney given by *B.* for that purpose, which last transactions took place three years before the date of the will. It was one of the questions, whether, under the above circumstances, the *debt* passed by the specific bequest? And Lord *Alvanley*, M. R. decided in the negative. 1st. Because it did not appear that the testator intended to include this debt; for, said his Honour, "the testator, at the time of making his will, must be supposed to have contemplated his affairs, and to have had a definite meaning as to the words he used. What then could he be supposed to mean by the direction to his executors to sell and dispose of his estate, and that the money to arise from such sale, with all other monies belonging to his estate, or that might belong thereto, should be remitted to *Great Britain*, &c.? Did he include this debt? If he were perfectly cognizant of this transaction, did he look to the *payment in Jamaica* by *B.*? He knew it was a debt payable by a debtor, who had removed from *Jamaica*, living in this country, who had given security for payment in this country, accepted by his attorney, which is the same as by himself. At that time, therefore, it must be supposed he *looked for payment in England*, so that his debt could not be part of the property *to be* collected and remitted to *England*. My inclination is in favour of the legatees; but I do not see sufficient to prove that the debt formed

(*t*) *Supra*, p. 188. *et seq.* (*u*) Ibid.

part of that specific legacy." And, 2dly, because "if this debt were paid under the last engagement, the executors could not have received it under an administration in *Jamaica*, nor have given the debtor a discharge. If he had complied with the obligation they must have an administration here. It would then be a strong thing to say that the debt passed to them, when they could not by their administration in *Jamaica* have collected it."(*x*)

So also in *Sadler* v. *Turner*,(*y*) *A.* bequeathed the residue of his fortune in *India* to his two children, and directed his executors there to remit to *England*, through the Company's treasury, all such property as he might be possessed of at his death. Between that event and the date of the will, 3237*l.* were remitted to this country, and a bill for 500*l.* was *in transitu* when *A.* died. It was one of the questions, whether these two sums passed under the specific bequest of the residue of *A's. India* property to the two legatees? And Sir *William Grant*, M. R. declared, that so much of *A's.* property as was remitted after the will, and before *A's* death, and what was at that time *in transitu* were to be considered property not in *India*, and therefore not disposed of. His Honour observed, as the reason of the decree, that the will could operate only with regard to property *in India* at the death of the testator; and he continued, "Supposing the words to be taken as words of description, yet nothing can pass but what he has described. The expression of intention *alone* will not do; unless some words, actually disposing of the property, can be found."

Sect. III. Of the title of a Specific Legatee to an excess of the fund, whether of *capital* or *profits accrued between the date of the will and the death of the Testator.*

With respect to the title of a specific legatee to an excess of the fund accrued or added to it between the date of the will and the death of the testator, that title must always depend upon the words of the bequest, viz. whether the words, consistently with the testator's intention, include within their import such excess. If then *A.* bequeath to *B.* 5000*l.* bank stock standing in his name, and a *bonus* be given by the bank, under the statute 56 Geo. 3. chap. 96, sect. 3, in the interval between the date of the will and the testator's death, the additional capital will not pass to the specific legatee. It was so determined by Sir *Thomas Plumer*, V. C. in *Norris* v. *Harrison*.(*z*)

In that case *A.* after reciting that he, by the will of *B.* was empowered to dispose of several capital sums of 1400*l.* &c. then standing in *C's.* name in the books of the Governor and Company of the bank of England, bequeathed the said several sums of 1400*l.* bank stock, &c. unto *D.* upon trust, &c. *A.* also bequeathed 11,000*l.* capital bank stock, then standing in his name in the same books, to *E.* and *E.'s* children, as therein mentioned. Subsequently to those bequests, and during *A.'s* life, the bank increased the capitals of each proprietor, by an addition of *twenty-five per cent*, by which the 1400*l.* stock was augmented to 1750*l.* and the 11,000*l.* to 13,750*l.*

(*x*) *Nisbett* v. *Murray*, 5 Ves. 149-157. (*y*) 8 Ves. 617-623.
(*z*) 2 Madd. 268-281. see also, *Smith* v. *Fitzgerald*, 3 Ves. & Bea. 2.

which were standing in *A.'s* name at his decease. One of the questions was, whether these *bonuses* or additional capitals passed to the specific legatees with the original stocks? And it was determined in the negative, for the following reasons: "The specific legacy," said the Court, "is of 11,000*l.* bank stock, and it cannot be said that 13,750*l.* bank stock passes under a legacy of 11,000*l.* bank stock. There are no words in the will to pass the additional capital to the legatee. On the same principle the legatees of the 1400*l.* stock are entitled only to that stock."

It seems to be an inference from the principles of the last two cases, that if a specific bequest be made of *all* or the *whole* of a testator's bank stock, or *three per cent* consols, *now* standing in his name, subsequent *bonuses* given by the bank during his life, or after purchased or acquired *three per cents*, cannot pass, because the terms of the gift do not embrace them. But that if the bequest be of all the bank stock or *three per cent* consols, which *shall* be standing in the testator's name *at the time of his death*, such *bonuses* and after acquired annuities will pass to the legatee, as falling within the words and intention of the testator.(*a*)

To apply these rules to the instance of a *partnership*. The last two cases prove that intention alone is insufficient to pass increased capital to the specific legatee; but that words disposing of it are necessary. If then *A.* bequeath to *B.* all that is *now* due to him *(A.)* in respect of his partnership with *C.* nothing would belong to *B.* but what was actually due to *A.* at the date of his will, since the words of gift confine the legacy to that period, and increased capital and profits between the date of the will and the testator's death would form parts of his general personal estate. But if the bequest were of all *A.'s* interest in the concern, or of his moiety or share in the capital and profits of the partnership, (terms not confining the legacy to the date of the will, but sufficiently comprehensive to include whatever *A.* might be entitled to on the above accounts *at his death*,(*b*) the whole then due to him would pass to the specific legatee.

SECT. IV. Of Mistakes in regard to the Subject specifically bequeathed. And,

1. Of mistakes in the description of the fund, and the admissibility of *extrinsic* evidence.

It was noticed in the last chapter,(*c*) that a mistake in describing a chattel specifically bequeathed, would not be fatal to the legacy; and an instance was produced of a horse bequeathed as *white*, when the only one the testator had was *black*. The principle was, that the testator meant to give his horse; which clearly appearing, the Court, in support of the bequest, rejected the word *white* as a mere error of description, so that the clause standing thus, "I give my horse to *B.*," was sufficient to pass the *black* horse.

But it must be observed, that the state of the testator's property when he made his will was necessary to be considered; which, when compared with the description of the horse bequeathed, showed that there was no *white* horse to be delivered to the legatee. Hence a

(*a*) See 15 Ves. 327. (*b*) See *ante*, p. 188. (*c*) *Supra*, p. 151.

latent ambiguity arose from the above comparison in regard to the testator's intention, viz. whether he did not intend for the legatee the horse he was possessed of when he made his will, whatever might be its colour; yet, without taking into consideration the testator's property, it is obvious, that the *black* horse could not be claimed by the legatee under the description of a *white* one. It however being settled, that in such a case the bequest of the horse will take place upon the inference drawn from a comparison of the state of the testator's property when he made his will with the terms of the bequest, we shall consider the application of the principle to instances of stock.(*d*) Suppose, then, a testator being possessed of three per cent *consols*, but having nothing in three per cent *reduced*, bequeathed to *B.* all his stock in three per cent *reduced:* if the state of his property could not be admitted, to show error in the description of the fund, the legacy would be void; but since, as in the former case, it was taken into consideration, consistency of principle requires that it should be so in the present, and consequently the error being made to appear, the bequest will pass the stock in three per cent *consols*. In *Selwood* v. *Mildmay*,(*e*) Lord *Alvanley* expressed himself on this subject to the following effect: "If the testator had the stock at the time, it would be considered specific, and that he meant that identical stock, and any act of his destroying that subject would be a proof of *animus revocandi;* but if it be a denomination, not the identical *corpus*, in that case, if the thing itself cannot be found, and there is a mistake as to the subject out of which it is to arise, that will be rectified." We shall now consider the cases.

In *Door* v. *Geary*,(*f*) *A.* bequeathed to his wife *B.* 700*l.* capital *East India* stock, in which he was then interested, possessed of, or entitled to. He had not at that time any *East India* stock, but there was 700*l.* *bank* stock, to which his wife was entitled under the will of *C.* (whose executrix she was,) after payment of debts, and which *A.* afterwards transferred into his name and made his own. The question was, whether this 700*l.* *bank* stock should pass, although described as *East India* stock? And Lord *Hardwicke* decided in the affirmative, observing that the mistake was *error demonstrationis*, and that the words *East India* should be rejected.

In addition to the above authorities, is that of Lord *Kenyon*, M. R. in *Dodson* v. *Waterman*,(*g*) in which *A.* bequeathed to *B.* the sum of 700*l.* capital stock in the three per cent *consols*, part of his then stock in that fund. He was not possessed of any stock whatever at the bank when he made his will, or at the time of his death; but he had 1800*l.* three per cent *South Sea* annuities. *A.* was blind at the date of his will, and had been so for many years. And the only question was, whether *B.* was entitled to 700*l.* part of the *South Sea* annuities, *A.* never having had any such stock as was specified in his will to answer the bequest? The Master was directed to report to the Court the state of the testator's property at the date of his will, who certified as above. Upon which Lord *Kenyon* ordered a transfer of 700*l.* *South Sea* annuities to *B.*

The principle of the last decision is the same with that of the case

(*d*) See *Evans* v. *Tripp*, 6 Mad. 91.
(*e*) 3 Ves. 310.
(*f*) 1 Ves. sen. 255.
(*g*) 3 Ves. 308, in a note.

preceding it, viz. that *error demonstrationis non nocet*, and that, to enable the Court to correct the mistake, the state of the testator's personal estate when he made his will, may be resorted to. His Honour accordingly observed, that the state of the testator's property made it manifest he was under a mistake as to the particular stock belonging to him; but that, whatever stock it was, he certainly intended to give the sum of 700*l.*, part of it, to *B.*

So in *Gallini* v. *Noble*,(*h*) the testator bequeathed all his money in the *Bank of England* to his daughters. It appeared that he never had money in the bank, but that he was entitled to some *three per cents* and *five per cents* bank annuities. Sir *William Grant*, M. R. held that those annuities passed, notwithstanding the inaccuracy with which the testator expressed himself.

And in *Hewson* v. *Reed*,(*i*) the testator gave legacies of stock, "being part of stock standing *in his name* in the books of the Bank of England," when all the stock to which he was entitled, was standing in the *names of trustees*. Parol evidence of mistake was admitted to show and rectify the error in describing the fund.

Upon similar principle, if a testator evince an intention to bequeath sums of money owing to him by *B.* on bond and other securities, and in describing the subject, as a whole, he mentions the *sum total* correctly, but incorrectly states it as owing upon *B.'s* bond only; the whole debt owing by *B.* on all the securities will nevertheless pass. For when the state of the testator's property is consulted, which shows that a *part* only of what was intended to be given, was secured by the bond of *B.*, but that *B.* was indebted to the testator in the sum total mentioned in the will upon the bond and other securities; the *latent* ambiguity of mistake arising from comparison of the terms of the bequest with the property, enables a court of justice to supply the defect in description by aid of the context; the intention clearly appearing from the context to bequeath the whole of the debt due from *B.* in whatever manner secured.(*k*)

Thus in *Williams* v. *Williams*,(*l*) a case in which *A.* made the following disposition: "Whereas my brother *B.* stands indebted to me by bond in the sum of 300*l. and upwards*, now I dispose of the same as follows: one-third thereof to the said *B.*; one-third to *C.*, and one-third to *D.*;" the three being brothers of *A.* The debt owing by *B.* was as executor of *E.*, who was indebted to *A.* in 200*l.* only by *bond;* in 100*l.* by covenant; and who had also given him a legacy of 50*l.* which remained unpaid. Upon a question whether the whole debt owing by *B.*, or the 200*l.* only secured by the bond passed? Lord *Kenyon*, M. R. said, he had no difficulty in declaring what *A.* meant to give, although the expression did not describe the situation of the money. His Honour conceived that *A.* thought of the *quantity* of the property; for having three relations, *B.*, *C.* and *D.*, he meant to give them the 300*l.* owing to him from *B.*, and consequently to include all *B.'s* debt. The decree was, that the debts by bond and covenant, and the legacy, passed under the bequest.

(*h*) 3 Meriv. 692. and see *Penticost* v. *Ley*, 2 Jac. & Walk. 207.
(*i*) 5 Mad. 451.
(*k*) See *ante*, p. 213.
(*l*) 2 Bro. C. C. 87. ed. by Belt, and see *Milner* v. *Milner*, 1 Ves. sen. 106. *infra*, vol. 2. ch. 21.

In conformity with the cases upon the present subject, was decided the case of *Selwood* v. *Mildmay*;(*m*) in which *B.* bequeathed to *C.* for life the interest of 1250*l.* "*part* of his stock in the *four per cent* annuities of the Bank of *England*, with such dividends as should be due on the said 1250*l.* at his death;" and he gave the capital after *C.'s* decease to several persons, always describing his stock as his *four per cent* stock. It appeared that he had not any *four per cents* either when he made his will or at his death; but that about two years prior to the will, he sold the whole of his stock in that fund, and invested the proceeds, also previously to his will, in *long* annuities, of which he had 137*l.* standing in his name at his decease. These facts were proved before a Master by affidavit, and reported by him to the Court; as also the substance of the affidavit of the attorney who prepared the will, stating how the error in describing the fund arose. And Lord *Alvanley*, M. R. decided, that the legacy should not be disappointed, but be paid out of the testator's personal estate.

The reasons for his Honour's decree appear to have been two; first, that a *latent* ambiguity arose from the circumstances of the testator not being sufficient to meet the legacy he had given; and secondly, that such ambiguity authorized the admission of *parol* evidence to show *how* the mistake arose; the error itself being sufficiently apparent.

But the case is of no further authority from the facts contained in it than to the following extent: that when a legacy is specific, *collateral* evidence (of the state of the testator's property at the date of the will) may be received concerning the subject to which the bequest applies, for the purpose of ascertaining whether the description agrees with it or not; and that if there be *no* such fund belonging to him as that described, and he had property in other funds not answering the exact description, but of the same nature with it,(*n*) such property will pass to the legatee, upon the presumption that it was meant to be given, though under a mistaken description. Such, it is presumed, is the law established by the cases. They are far from countenancing the proposition, that if a testator had any stock in the fund described, either the state of his property, or any other extrinsic evidence could be admitted to explain or ascertain the *meaning* of the testamentary words used in disposing of it; a subject which we shall proceed to consider—

Secondly. No rule of law is more clear, than that a will is not to be expounded by *extrinsic* evidence. Hence the *intention* of testators in making a specific bequest, or in giving a general legacy, cannot be controlled by the statement of their property.

Accordingly, in *Innes* v. *Johnson*, a decision upon the question whether a bond was specifically bequeathed, Lord *Alvanley*, M. R. thus expressed himself:(*o*) "It turns out that there was among the assets *one* bond for the *exact amount* of the legacy; but there were also many other bonds belonging to the testator, and it was insisted, and *very properly*, that the Court is to determine, upon the face of the will, whether the legacy be specific or pecuniary, and not to tra-

(*m*) 3 Ves. 306. (*n*) See *Evans* v. *Tripp*, 6 Mad. 91.

(*o*) 4 Ves. 573. stated *supra*, p. 174.

vel into the account of the effects to see whether that shall be turned into a specific legacy, which upon the face of the will is to be taken as pecuniary.(*p*) It was argued, I think with *great success*, that if upon the face of the will the legacy is to be presumed not to be specific, I ought not to travel into the account of the effects to turn it into a specific legacy. If it had rested upon the first words, 300*l. upon bond*, should I ask any other question than this, whether the testator had more than *one* bond? If he had only one of that particular amount, that, I think, is not sufficient, and would be too slight a ground; but if he had *only one* bond in the world, I must have supposed he meant that." From this opinion, and the cases referred to in the last note, it seems to follow, that however difficult it may be to ascertain the meaning of a testator from the expressions used by him, a Court is bound to confine itself to the will's context, and to put the best construction it can upon the whole without calling in aid extrinsic evidence to explain the words of the bequest. Thus a legacy of 50*l.* a year in *long* annuities cannot be changed from an annuity to a *capital* sum of that amount, either from the state of the testator's property, or other extrinsic evidence showing that a sum of 50*l.* only was intended to be given.(*q*) Or if, from the words used in reference to the fund, it be doubtful whether a *principal* sum might not be intended instead of an annuity; still, unless the context clearly show an intention that a *capital* sum only was meant to pass, it is presumed that the legacy must be of an *annuity*, and not of a *gross* sum; and that *external* evidence as to the state of the testator's property cannot be admitted to control what would be the legal import and effect of the terms of the bequest, upon a fair construction of the *whole* will, without *collateral* aid.(*r*) There is a case, however, difficult to be reconciled with these observations, which it is necessary to consider.

In *Fonnereau* v. *Poyntz*,(*s*) *A.* bequeathed "the sum of 500*l.* stock in *long* annuities to *B.*;" and after two other legacies expressed in similar language, *A.* gave to *C.* "the sum of 200*l.* stock in *long* annuities; the *interest* thereof to accumulate till *C.* attained the age of twenty-one, and then the whole to be transferred to her." And he gave another legacy, similarly expressed, to *D.* *A.* had 120*l.* a year *long* annuities, and no more. And the question was, whether capital sums only were intended for the legatees? in which case, the proceeds from the sale of the *long* annuities would be sufficient to pay all; or whether *annuities* of those amounts were intended? and if so, then the estate of *A.* would be greatly insufficient to answer those purposes. The solution of the question depended upon a preliminary one, *viz.* whether the state of *A.'s* property could be looked at to enable the Court to put such a construction upon the words of the bequests, as from the condition of that property it was likely that he meant in using those words? And Lord *Thurlow* decided, that such evidence was admissible in this instance, since the expression in the will, *viz.* "sum of *l. stock* in long annuities" used in giving some of the legacies, and *interest* being directed to

(*p*) See *Andrews* v. *Emmot*, 2 Bro. C. C. 297--303. ed. by Belt, and Lord *Eldon's* observations in *Nannock* v. *Horton*, 7 Ves. 400. See also 2 Meriv. 537. 1 Swanst. 71. (*q*) 1 Bro. C. C. 482. 3 Meriv. 319. and see *Chambers* v. *Minchin*, 4 Ves. 675. (*r*) 1 Ves. jun. 285. (*s*) 1 Bro. C. C 472.

accumulate, in the others upon "sums of *l.* stock in long annuities," rendered it uncertain upon the whole context of the will whether *A.* intended to give *gross* sums or *annuities;* which uncertainty (though appearing on the face of the will, and therefore a *patent* ambiguity) authorized the admission of evidence *dehors* the will to show whether *A.* really meant to give annuities or gross sums. The state of *A.'s* property being thus admitted to prove what he *meant* to pass by the words of his will; his Lordship finally decreed (but not without difficulty as to the admissibility of the evidence) that the legatees were only entitled to *capital* sums, since it appeared, from the state of *A.'s* property, that if they took annuities, they would amount to *ten times* more than *A.* was worth.

The following are objections which may be taken to the last decree:

First, that the legacies not being specific, but so given as to be satisfied by the executors purchasing long annuities, if the assets had been sufficient, the principle upon which evidence of the state of the testator's property is admitted to correct a mistake in the *description* of the fund intended to be given, or of part of it, does not apply: that principle was mentioned and illustrated in the first subdivision of this section. This remark appears to meet the observations made by Lord *Eldon* in support of this decree in *Druce* v. *Dennison.*(*t*) Secondly, that an obscurity arising upon the face of a will, does not authorize an explanation of its terms by *extrinsic* evidence. So that in this case, whether *A.* meant by the words used by her, *capital* sums or *annuities* was a question only to be determined by the legal import of such words, and what clearly appeared from the context of the will. And, thirdly, that as from what was plainly expressed in the will, the legatees (as admitted by Lord *Thurlow*)(*u*) would have been entitled to annuities; the legal import of those expressions ought not, as it is conceived, to have been controlled by any thing *dehors* the will; and not even by the context, unless it clearly showed what was the intention of *A.* in using the words in contradiction to their legal sense. As to this, the observations of Sir *William Grant* are particularly applicable, which will be afterwards stated when the case of the *Attorney General* v. *Grote*(*x*) is considered.

It would seem, that for the above reasons, the case of *Fonnereau* v. *Poyntz* must be considered anomalous. And although Sir *William Grant* intimated that in a case *precisely* the same he *might* be disposed to follow that precedent,(*y*) yet when it is known that his inducement to do so would be the great disproportion between the state of the testator's property and the legacies, if considered annuities, it may be doubted, whether if his Honour had been pressed for a decision in such a case, he would not have hesitated in adopting the precedent of *Fonnereau* v. *Poyntz*, upon the ground that the rule, as to non-admission of evidence *aliunde* to explain, alter or control the words of a will has no dependence upon, or relation to, the adequacy or insufficiency of the property to answer the bequests,(*z*) but is founded upon the principle that a will in writing cannot be varied or explained by parol testimony.

(*t*) 6 Ves. 401. and see *Chambers* v. *Minchin*, 4 Ves. 675. (*u*) 1. Bro. C. C. 479.
(*x*) 3 Meriv. 321. and see *Hay* v. *Earl of Coventry*, 3 Term Rep. 85.
(*y*) 3 Meriv. 319. (*z*) *Jones* v. *Curry*, 1 Swanst. 71.

In proof that where the legacy is *general* of a *sum* of money *in* a particular stock, in which the testator had no property, evidence cannot be received to show that he meant to give it out of other property of which he was possessed in another stock, may be adduced the case of *Chambers* v. *Minchin*,(*a*) in which *A.* after giving the trustees 1000*l.* to lay out in government or other securities upon certain trusts, bequeathed to them "a further sum of 2,400*l.* *in* the five per cent *consolidated* bank annuities," upon various trusts. The only stock which *A.* had at her death, was 156*l.* a year *long* annuities; and the question was, whether *a sum* of 2400*l.* should be vested in five per cent annuities, or the bequest was to be considered as of so much as would produce 120*l.* *per annum long* annuities; and evidence was offered to show that the latter was *A.*'s intention, and the reference in the will was a mere mistake in the description of the fund. But Lord *Rosslyn* rejected such evidence, and decreed upon the words in the will, that *a sum* of 2400*l.* should be purchased by the executors in *five per cent.* annuities.

The principle of the last decree seems to have been, that the legacy being in form general of a *sum* to be invested in a fund sufficiently, though inaccurately, described, the rule that prevails in such cases apply to the present, viz. that the executor should purchase the sum specified in the fund intended. And that since there was no necessity, (as in the instance of a specific legacy) to resort to the state of the testator's property to ascertain the agreement between it and the thing given, evidence *dehors* the will was not admissible to raise a mistake, and then to correct it upon proof of the testatrix's intention. Hence this case is in harmony with the distinctions which have been made on the admissibility of extrinsic evidence in exposition of wills.

But suppose legacies to be given *specifically* as *annuities* in a particular fund, in which the testator *had* annuities, but *inferior* in amount to those given, and yet amply sufficient to answer the legacies if considered as bequests of *capital* sums, there is no principle upon which *evidence* to prove the latter to have been the intention could be admitted that would not authorize the introduction of such evidence for the exposition of wills generally. It should seem, therefore, that in the instance proposed, the state of the testator's property may be so far looked at as to see whether any parts of it consists of the particulars described in the specific disposition, and for no other purpose; so that if the words of the bequest give *annuities* exceeding the amount of the fund, the legatees must abate; and it is conceived that the mere circumstance of the property being insufficient to answer the legacies as annuities is not allowable to alter or restrain the legal import of the words of the bequest. The case next stated proves this; and it seems an authority in direct opposition to *Fonnereau* v. *Poyntz* before considered; and it also confirms what was before stated, that *patent* ambiguities, *i. e.* obscurities appearing upon the face of a will, cannot be dispelled by *extrinsic* evidence, but that the testator's intention must be collected from a rational construction of his whole will.(*b*)

(*a*) 4 Ves. 675. (*b*) On the present subject see *ante*, Chap. II. sect. 18.

Thus in the *Attorney General* v. *Grote*,(*c*) *A.* specifically bequeathed two legacies of 5*l.* each to *B.* and *C.*, by descriptions of "5*l. per annum* bank *long* annuities." *A.* then gave to *D.* and *E.* two legacies of 100*l.* each, in these words, "100*l. long* annuities *stock*," and she bequeathed to *F.* "30*l.* a year further part of her *long* annuities," to apply the *dividends* as therein mentioned. *A.* also gave to *G.* "150*l.* bank *long* annuities *stock*," and made a codicil in which *A.*, after noticing that she might have made a wrong calculation of the value of her fortune in the funds from the uncertainty of their price at her death, directed an eventual deficiency to be supplied by her residuary estate. *A.* died possessed of 385*l. per annum* long annuities, and of no other stocks or annuities. The long annuities and her other personal estate were insufficient to pay her debts, funeral, and testamentary expenses, without the aid of the *long* annuities; and was insisted, in opposition to *D.'s* claim of 100*l. a year* long annuities, that under the circumstances, the legacy ought to be considered a *capital* sum of 100*l.* to be raised by sale out of those annuities. But Sir *William Grant*, M. R. decreed that the legacy was of 100*l. a year long* annuities; and said, there could be no doubt that if *A.* had given a single legacy "of 100*l. long* annuities stock," the legatee would have been entitled to a *long* annuity of that yearly amount. But that a doubt was raised partly from the circumstance that *A.* had *not stock enough* to answer all the legacies she had given in these terms, if they were considered as *annuities*, and partly from her having, in other instances, specified her legacies as consisting of so much *per annum* in bank long annuities. His Honour admitted that those circumstances created a doubt whether *A.* meant to give 100*l. per annum*, when she did not expressly say so, but he said, that if *A.* did not so mean, he was greatly at a loss to say what it was that she did mean; since it was hardly conceivable that any person intending merely to give 100*l.* in *money*, should use the words, "long annuities *stock*." And his Honour in concluding his judgment thus expressed himself: "The question comes round to this; whether, as the words used are *properly* descriptive of so much stock of bank long annuities, it appears (as Lord *Thurlow thought* it did in *Fonnereau* v. *Poyntz*,(*d*) *perfectly* clear, from other circumstances which amount to demonstration, that *A.* did not mean them in that sense? I think it does not, and that therefore I am not warranted in striking out or leaving inoperative the words 'long annuities stock.' To authorize a departure from the words of a will it is not enough to doubt whether they were used in the sense which they properly bear. The Court ought to be quite satisfied that they were used in a different sense; and ought to be able distinctly to say what the sense is in which they were meant to be used.(*e*) A legacy of 100*l.* is a different thing from a 100*l. stock*. *A.* has expressly given '100*l.* long annuities stock;' but I am desired to hold that she meant 100*l.* in money. I do not say it is not doubtful whether she may not have meant this; but there is not enough to show *clearly* that it is what she did mean; I must therefore abide by the words of the will and decree accordingly."

(*c*) 3 Meriv. 316. (*d*) *Supra*, p. 203. (*e*) See *Smith* v. *Maitland*, 1 Ves. jun. 362-364.

Most of the cases before produced in this section were instances of totally erroneous descriptions of the things intended to be given, as where testators had no property whatever to bequeath in the funds they referred to. We shall now proceed to consider(*f*)—

3. The consequences of *mistakes* in the *calculation* of the specific fund of which the testator is possessed when it is wholly given to an individual or for a specific purpose, and when to several persons in fractional parts.

As to the first it is settled, that when the intention is apparent from the will to give a particular fund, a wrong description or recital of its actual amount will not disappoint the bequest whether the fund be less or more than as described.

Thus in the *Attorney-General* v. *Pyle*,(*g*) *A.* bequeathed as follows: "Whereas there is now owing to me from *B.* and company the sum of 1000*l.*, I do hereby give the *said* sum to *C.*" The debt due to *A.* at his death was no more than 365*l.* 17*s.* 6*d.* And Lord *Hardwicke* decreed that sum to *C.*, observing, "that a wrong description and falling short would not defeat the legacy."

But when the fund *exceeds* the sum at which it is estimated, and the form of bequest purports to give the estimated sum only, the excess will not pass to the specific legatee, unless it *clearly* appear, from the will's context, that the whole of the property was meant to be given, and the mentioning of the smaller sum was a mistake; because the words of the bequest comprehend no more than the latter sum.(*h*) This will appear from the case of *Hotham* v. *Sutton*:(*i*)

In that case *A.* by her will *recited* that she was possessed of 12,700*l.* three *per cent* consols standing in her name, and gave the *same or so much* of such bank annuities as *should* be standing in her name *at her death*, to her executors upon several trusts. When *A.* died, and also when she made her will, she was possessed of 14,765*l.* 16*s.* 9*d.* three *per cent* consols; and it was a question whether the excess, beyond the 12,700*l.* three *per cent* consols, should pass to the executors under the above bequest? And Lord *Eldon* determined that the 12,700*l.* three *per cent* consols only passed from the uncertainty of the real intention of the testatrix; for his Lordship said that, considering the bequest not to be of 12,700*l.* three *per cents*, but *of so much* of such annuities as should be standing in her name *at her death*; such would be a very difficult construction,—first, as, if that were *A.'s* intention, though there should be ten times the amount, there was no reason for *reciting* she was possessed of the above sum of 12,700*l.*; and secondly, from the consequence that if *A.* had sold the whole of the stock, and remained for some time without any, and then bought other stock, the Court must have held that she had bequeathed not what she had at the date of her will, but what she had at her death. His Lordship also observed, that he could not suppose *A.* to be ignorant of the state of her property, unless the fact appeared upon her will; and that it did not follow from the *recital* that understanding she possessed no more than 12,700*l.*, she intended to give *all* she possessed, whether more or less, which would

(*f*) See *Colpoys* v. *Colpoys*, 1 Jac. 451.
(*g*) 1 Atk. 435.
(*h*) See *ante*, p. 218, 219.
(*i*) 15 Ves. 319.

amount to this; that measuring her bounty and the extent of it (as she *appeared* to do by the *recital*,) she intended to give 200,000*l.* if she should have it. Between the two propositions that she meant to dispose of so much of such *bank annuities* as by the *recital* she said she *had*, or of such as she *might have*, though upon the latter construction, if she acquired stock to the amount of 200,000*l.* the whole must have passed to make good a bequest, the extent of which she measured by the *recital* as to 12,700*l.*, his Lordship said the better legal opinion seemed to be that the *last* sum only passed.

With respect to the consequences of a *miscalculation* of the specific fund where it is bequeathed in fractional parts.

A general remark may be made as applicable to this subject: that when a particular fund is given in parcels, and the sums, or parts of stock are mentioned, but the property is taken to be more than its real amount or value, the fund must be divided amongst the legatees according to their proportions of it. But that if the last taker be named or described as *residuary* legatee of the specific subject, he will only be entitled to what (if any thing) shall remain after the prior specific legatees have been paid *in full* their several proportions, subject however to exceptions when a contrary intention appears from the context of the will. These observations will be illustrated by the following cases:

In *Danvers* v. *Manning*,(*k*) *A.*, after specifically bequeathing by will parts of his stock in the public funds, proceeded by codicil to the following effect: "I find that I have willed away only 5600*l.* in bank four *per cents*, and I find I have there at present 6000*l.*; I give the interest of the *remaining* 400*l.* to *B.* for life, and at her death, it must go with the rest to *C.*" *A.* was mistaken in what he had given by his will, for the residue of his bank four *per cents* exceeded 400*l.* And it was contended for *B.* that the legacy was not particular, but *residuary*, so as not only to pass the 400*l.* but the surplus of the fund. And Lord *Thurlow* was of that opinion, although he observed that *A.* had miscalculated the particular residue, and probably did not mean *B.* to take so much, yet his Lordship thought that in declaring *B.* to be entitled to the whole of it, he was nearer the point of *A.*'s intention, than any of the constructions contended for against it.

It is to be noticed, that in the last case, the amount of *B.*'s legacy was specified; yet, since it was given in the form of *residue* of the fund, and there was no expression or intention as to what should become of an excess beyond the 400*l.* Lord *Thurlow* gave it to *B.* in the character of residuary legatee of the specific property. But in an instance which will be next produced, although the legatee took, as in the last case, the remainder of the specific fund in the form of a *residue;* yet the Court decided upon the *context* of the will, that he was to be considered as much a *particular* legatee of his proportion, as the other specific legatees of their shares, upon the principle, that the testator had assumed the property he directed to be sold, would produce a *certain* sum, which he intended to be divided amongst the persons named in his will; it being supposed

(*k*) 2 Bro. C. C. 19. 22. Ed. by Belt. 1 Cox, Rep. *S. C.* 203.

that he computed the share of the last taker, although it was not named, but given to him as the *residue* of the *fund*.

Thus in *Page* v. *Leapingwell*,(*l*) *A.* devised to trustees certain lands to sell, but not for less than 10,000*l*. *A.* under the belief that the property would produce at the least that sum, proceeded to dispose of it in fractional specified sums for the benefit of *B.* and other persons; and after payment of those legacies, he directed his trustees to invest the "overplus" monies arising from the sale in the public funds for the equal benefit of *C.* and *D.* *A.* afterwards made a general residuary disposition of his property. The lands were sold for less than 7000*l*. under a decree; and one of the questions was, as to the interest which *C.* and *D.* took? If they took in the character of *residuary* legatees of the fund, they would be entitled to nothing, as there was not any surplus; but if as *particular* specific legatees with the others, then they would be entitled to participate in the fund with such other legatees, in the proportions intended, if the property had produced 10,000*l*. (proportions intended, which amounted to 2200*l*.) and to be paid what should appear to be owing on that sum, after abating with their specific co-legatees: and Sir *William Grant*, M. R. was of opinion, that *C.* and *D.* were so entitled, since the testator assumed that he had 10,000*l*. to distribute, and made distribution on that supposition; meaning, however, that if there had been an excess of the fund, *C.* and *D.* should have it. His Honour, therefore, upon intention, collected from the context of the will, restrained the general import of the word "overplus," to the meaning of a certain sum remaining of an ascertained fund, after taking out of it the other sums specifically given, and considered that all the legatees were intended to have certain defined parts or proportions of it, by whatever words they were given.

We may remark, that of the last two cases, the first is an authority, that a legatee of part of a specific fund given to him in the form of *residue*, the supposed amount of which residue is named, will, nevertheless, take in a character of residue, whatever excess there may be beyond the specified sum; and the second, is an authority that whether the sum be mentioned or not, if the fund have been erroneously estimated, and is therefore unable to answer in full, all the specific dispositions made of it, a legatee in form *residuary*, will be considered *particular*, and entitled to a share of the property, (estimated at what would have been his proportion if the fund had been of the amount supposed,) after abating with his co-legatees.

SECT. V. The rights of SPECIFIC LEGATEES against the EXECUTORS.

If a legacy be of a silver cup or a jewel, and it be in pledge at the testator's death, the legatee has a right to call upon the executor to redeem it, and deliver it to him;(*m*) and so it is by the civil law.(*n*)

So also if the bequest were of specific *stock*, and it happen to be sold by the executor, when there was no necessity for the sale to pay debts, the equity of the legatee is to have the stock replaced according to its value at the end of a year next after the testator's

(*l*) 18 Ves. 463. (*m*) 2 Bro. C. C. 113. (*n*) Swinb. pt. 7 sect. 20. p. 548.

death, since the fund, if not sold, was then transferable to the legatee.(*o*)

In *Chaworth* v. *Beech*,(*p*) a specific legacy of a note for 8000*l.* was given to *B.* The amount was paid into Court, pursuant to an order, in a cause then depending about six years before this suit; and the money was laid out in *three per cent* consols. In the first case the legacy was considered general, a mistake corrected in the present. The question was, whether *B.* was entitled to the sum due upon the note, or to the *stock* purchased with it? And Lord *Alvanley*, M. R. declared, that *B.* was entitled to the sum due upon the note at the time it was paid into Court, with interest at *four per cent* from that period. And in answer to what was insisted *to the contrary, viz.* that *B.* was only entitled to the stock purchased; "That," (said his Honour,) "would be the greatest injustice to *B.* for she had a right to the specific legacy; and if the assets did not want it, she had a right to have it delivered up. She was not bound to lay it out in the funds, but if she had so done she would have a right to the rise and be liable to the fall. Instead of that, the executors having insisted that it should not go out of Court, it was paid in and laid out in stock." The Court, therefore, decreed, as before stated; and that *B.* was not obliged to take the stock which had become depreciated in value.

Upon the same principle, if a horse were specifically given, which the executor refused to deliver, lest there should be a deficiency of assets to pay debts, and having used and worked the horse a considerable time, he afterwards offered to deliver him to the legatee; the latter may insist upon the *value*. Or if the horse had been unnecessarily sold, and the proceeds applied in payment of debts, the legatee would be entitled to the value of the animal, with interest, from the moment it was so disposed of.(*q*)

It may be considered as settled, that *after a decree* obtained in a suit for the administration of assets, the Court will not only restrain executors from selling(*r*) or applying specific legacies in discharge of debts, but enjoin creditors from proceeding at law against the executors,(*s*) upon the principle that the assets are to be administered in equity, and no delay or injury can arise, since the funds will be properly applied under the eye of the Court; and if the plaintiff neglect to prosecute the decree, a defendant or a creditor, who had proved his debt before the Master, will be permitted to do so.(*t*) So far the law and its principle are clear.

But it may happen that specific legacies, if disposed of, may admit of no adequate compensation to the legatees, as of family pictures, &c.; and that an executor, from malicious motives, may be desirous and intend to apply a specific legacy to pay debts, although the general assets may be sufficient to satisfy all demands. And for the purpose of affording a pretext for such a procedure, he may in collusion with a creditor, induce such creditor to bring an action, and

(*o*) *Morley* v. *Bird*, 3 Ves. 629. (*p*) 4 Ves. 556. 563. 567. (*q*) 4 Ves. 563.
(*r*) See Moseley's Rep. p. 376. (*s*) *Kenyon* v. *Worthington*, 2 Dick. 668. *Brooks* v. *Reynolds*, 1 Bro. C. C. 183. *Goate* v. *Fryer*, 3 Bro. C.C. 23. *Paxton* v. *Douglas*, 8 Ves. 520. *Perry* v. *Philips*, 10 Ves. 39, 40. *Gilpin* v. *Lady Southampton*, 18 Ves. 469. *Jackson* v. *Leaf*, 1 Jac. & Walk. 229.
(*t*) *Powell* v. *Wallworth*, 2 Madd. 183. *Sims* v. *Ridge*, 3 Meriv. 458.

then pretend that he was under the necessity of paying the debt with the specific funds as the only property in his possession with which he could discharge the demand. In the absence of authority, it may be presumed, that in the first case a court of equity will restrain the executor from acting contrary to his duty, and in opposition to the testator's intention; and that in the second, the Court will not only enjoin the executor from disposing of the specific legacies, but will also restrain the creditor, even before decree, from receiving satisfaction out of them, in consequence of legal proceedings begun and continued *in fraudulent collusion* with the executor.(*u*) It is however clear, that the Court will give such directions to the executor as may be necessary for preserving the specific property to the legatees; and which was done by Lord *Eldon* in the case below referred to.(*x*)

SECT. VI. We shall lastly proceed to consider the Rights of Specific Legatees of Goods and Chattels in remainder, against those entitled to them for life.

1. When an inventory or security will be required.

In instances where parts of a testator's personal estate are specifically bequeathed for life, with an executory limitation after the death of the tenant for life to another person; the first legatee must sign and deliver to the second an inventory of the chattels, expressing that they are in his custody for life only, and that afterwards they are to be delivered and remain to the use and for the benefit of the second legatee.(*y*) But it seems to have been the ancient practice of the Court of Chancery to require the person entitled to the partial interest, to give security to or for the benefit of the legatee appointed to succeed him.(*z*) The practice, however, became gradually altered as above stated, upon a conviction, that requiring from the first legatee only an inventory of the property specifically bequeathed, was attended with more equal justice to both legatees. Besides, as the testator had thought proper to entrust the first legatee with a personal use of the articles for life, it was not for the Court to destroy that confidence, except under special circumstances. But if such circumstances be shown and proved as would make it dangerous to trust the chattels in the hands of the first legatee, without taking a sufficient security, as in the instance of insolvency, such security will be required. In *Foley* v. *Burnell*,(*a*) Lord *Thurlow* thus expressed himself: "The cases as to tenant for life giving security for the goods, have been over-ruled, and the Court now demands only an inventory; which is more equal justice, since there ought to be *danger* in order to require security."

2. Effect of renewal of leases by specific devisees for life.

It has occurred that devisees of partial interests in terms of years have renewed them, and questions have arisen between those devisees and the persons appointed by the will, to take them in remainder, upon the subject of the beneficial interests in the new leases. But the following rule appears to be firmly settled, *viz.* that

(*u*) *Alsager* v. *Rowley*, 6 Ves. 750. (*x*) *Clarke* v. Lord *Ormonde*, about *April* 1821, since reported, 1 Jacob. 108. (*y*) 3 P. Will 336. 1 Atk. 471. 2 Atk. 82. (*z*) 9 Mod. 93. 2 Vern. 453. (*a*) 1 Bro. C. C. 279. & see *Rous* v. *Noble*, 2 Vern. 249.

if a term for years be given to *A.* for life, with an executory devise to *B.* after *A.*'s death, and *A.* surrender the old and take a *new* lease, *A.* will hold the renewed lease upon the trusts of the old one; upon the principle, that it being manifestly the intention of the testator, in giving a renewable interest, that the renewed interest should enure for the benefit of all the persons interested in the old term, a court of equity will not permit that intent to be defeated. It therefore holds *A.* to be a trustee of so much of the renewed term as shall remain after his death, for the benefit of *B.*(*b*)

So it will be if the testator were only tenant from *year to year*, and bequeathed the farm to *A.* and *B.* successively as above, and *A.* procured a lease of it for a term of years; because the testator having an interest at his death, which he was entitled to dispose of,(*c*) the first legatee is not allowed to take the new lease, except upon the trusts of the will; the case being in principle the same as that before proposed. And it is indifferent whether the renewal be made by the tenant for life, or by an executor or trustee.(*d*)

Thus in *James* v. *Dean*,(*e*) a testator gave "all the estate and interest" he should have at his death in certain leasehold premises (describing them) to *A.* for life, remainder to *B.*, *C.* and *D.* The lease under which he held the estate expired some time before his death, but he continued in possession, and became tenant from *year* to *year* at an annual rent. *A.* was executrix as well as tenant for life, and obtained a new lease; and the questions were two; 1st. whether the testator had at his death such an interest as could and did pass by his will; and 2dly, supposing that to be so, whether it was such an interest as precluded *A.*'s renewing for her sole and exclusive benefit? And Lord *Eldon* determined both questions in the affirmative, upon the principles before stated.

3. When tenant for life renews a lease bequeathed to him, and to others in remainder, to which new interest a court of equity, as we have seen, attaches the trusts of the old lease; the remainder men have a right to call upon the tenant for life to contribute so much of the fine as is proportionate to his actual enjoyment of the new term, the old rule of contributing one-third of the whole being now exploded.(*f*) The following instance will show what are the conditions upon which the persons in remainder will be entitled to the trust of the renewed lease. Suppose *A.* to be a tenant for life of a term under a devise as above, and to renew for twenty-eight years, when twelve of the old term were unexpired. Suppose also *A.* to have enjoyed nine years of the new term, after the expiration of the twelve years, residue of the original term. Lord *Thurlow* declared, that the Master ought to take the sum paid by *A.* for renewal of the lease, as the value of the term purchased, *viz.* the term of twenty-eight years, to commence at the end of the twelve years. That the Master should then consider the value of the term of nine years after the existing

(*b*) *Taster* v. *Mariott*, Ambl. 668. *Rowe* v. *Chichester*, ibid. 715. *Pickering* v. *Vowles*, 1 Bro. C. C. 197.

(*c*) *Doe* v. *Porter*, 3 Term. Rep. 13. (*d*) 3 Meriv. 196.

(*e*) 11 Ves. 383. 395. and see *Randall* v. *Russell*, 3 Meriv. 190. 196. also 1 Ball & Beat. 46. *Mulvany* v. *Dillon*, ibid. 409. 411. *Winslow* v. *Tighe*, 2 Ball & Beat. 195. 205. *Eyre* v. *Dolphin*, ibid. 290. 298. *Hardman* v. *Johnson*, 3 Meriv. 347.

(*f*) See *White* v. *White*, 9 Ves. 554.

term, and what the term of nineteen years after the existing term, and the nine years was worth, the latter being the proportion to be paid by the remainder-man.

With respect to *interest* to be allowed to *A.* on the fine paid *in prospectu, i. e.* for the enjoyment of the new term after the twelve years of the old would have expired, and during which period *A.* would have been entitled to enjoy the estate, if no renewal had been made, Lord *Thurlow* declared, that as the value of the lease was calculated on compound interest, *A.* should be allowed *compound* interest at *four per cent*, to be computed upon the proportional value of the nineteen years term to the whole expense of renewal, and up to the death of *A.;* from which time as *A.'s* legal personal representatives only stood in relation to the remainder-man as common creditors, they were merely entitled to simple interest. Which arrangement his Lordship considered to be the justice of the case; since as, on the one hand, *A.* could not renew for his own benefit, so on the other, the remainder-man should not be permitted to take the renewal at *A.'s* expense.(*g*) And it is to be observed, that there is no difference in relation to this subject between a renewable term for years, and a renewable lease for lives.(*h*)

The same rule of construction appears to apply, but in a different manner, when the renewable leasehold estate is bequeathed to *trustees*, in trust for *A.* for life, remainder to *B.* for life, remainder to *C.*: with a direction to renew and pay the fine out of the rents and profits. It seems to be the duty of the trustees, in such a case, to provide an accumulating fund out of the rents and profits during the enjoyment of *A.* to answer the renewals to be made in his time; and to pursue the same conduct during the life of *B.* If the trustees omit to renew at proper times during the lives of *A.* and *B.* so as that the fine for renewing become greatly enhanced upon *C.'s* succeeding to the estate, they (the trustees) will be personally liable to *C.;* and they will be entitled to resort to the assets of *A.* and *B.* for repayment. But suppose *B.* to have been a married woman, the wife of *A.* to whom therefore no neglect or misconduct could be imputed for non-renewals in *A.'s* life-time, her estate would be only answerable to the trustees for so much of the rents of the leasehold estate, as she after *A.'s* death received, and which ought to have been appropriated as a fund for a renewal, and not for the excess of the fine occasioned by not renewing at the usual and proper times during *A.'s* life. The following case, as finally determined by Lord *Eldon* on appeal, established the foregoing observations:

In Lord *Montford* v. Lord *Cadogan* first decided by Sir *William Grant*,(*i*) a renewable lease of forty years was, by marriage settlement in 1772, vested in trustees, with the benefit of renewal, to hold for the remainder of the original term, and for all renewed terms in trust for Lord *Montford* till the marriage. Afterwards the trustees were directed to pay, with the rents, issues and profits, the fines and expenses of renewal and the costs of executing the trusts; and after

(*g*) *Nightingale* v. *Lawson*, 1 Bro. C. C. 443. Ed. by Belt. 1 Cox, 181. and *vide* Lord *Eldon's* observations in *White* v. *White*, 9 Ves. 558.

(*h*) 9 Ves. 559. 2 Bro. C. C. 243.

(*i*) 17 Ves. 485. *et vide* Lord *Milsington* v. Earl of *Mulgrave*, 3 Mad. 491. 5 Mad. 471. *S. P.*

payment of such rent, costs, charges and expenses, and performance of the covenants, &c. the premises were to be holden by the trustees in trust to permit Lord *Montford* to receive the rents for life, and in like manner to suffer Lady *Montford* (his intended wife) if she were the survivor to take the rents for life; and, after the death of the survivor, to raise by mortgage or sale any deficiency of younger children's portions provided by the deed. And, if there should be a residue of the leasehold estate, in trust to permit his first son to receive the rents until he attained twenty-one, and then to assign the estate to him. The lease was renewable at the expiration of every fourteen years; and Lord *Montford* died 1799, after enjoying the estate for twenty-seven years; but the trustees neglected to renew, and permitted his lordship to receive all the rents during his life. Lady *Montford* survived him, and was in possession, as the second tenant for life, from 1799 to 1808, when she died, and was succeeded by the plaintiff, the only issue of the marriage. The lease ought to have been renewed in 1785 and in 1800; and it appeared that after the renewal in 1786 ought to have been made, Lord *Montford* assigned his life estate to Lord *Howe*. Under those circumstances Sir *William Grant* decided the following points. First, that the present was a case of contribution. Secondly, that Lord *Montford's* assets, if sufficient, were first applicable to make good so much of the fine as corresponded with the period of his enjoyment. Thirdly, that Lady *Montford* his widow, the second tenant for life, was in like manner answerable for the period of her possession; and that the residuary rents during her life were liable to be impounded to make good the demand against her. Fourthly, that the trustees were answerable for the deficiency of any of those funds. And lastly, that the trustees, having in breach of their duty permitted the whole of the rents to be received by Lord *Montford*, could not call upon Lord *Howe*, his assignee, as standing in his place, for a contribution, or to exempt them from any part of their responsibility.

The last decree was partially confirmed and in part altered by Lord *Eldon*, by whom it was considered on appeal.(*k*) The liability of the trustees and the exemption of Lord *Howe* were assented to by him, but as a larger fine for a renewal was required in consequence of the omission of the trustees to renew for twenty-eight years, his Lordship declared, that Lady *Montford's* estate was not liable to the trustees for such excess; since as a married woman she was not chargeable with any default of renewal during her marriage; and his Lordship further observed, that *Lady Montford*, in "1799, was entitled by the settlement to possession of this leasehold estate, under a lease renewed in 1786 for fourteen years, in addition to twenty-six years then remaining unexpired, with a fund accumulating for the fine to be paid on the next renewal in 1800. If, therefore, this was to be thus understood, that as *Lord Montford* enjoyed from 1772 to 1779, and *Lady Montford* from 1799 to the year 1808, when a fine exceeding 3000*l.* was paid, that sum was to be remembered as between his and her estate in this proportion, viz. his estate was to be charged according to the amount of the rents between 1772 and 1799, and she was to pay according to the rents from 1799 to 1808."

(*k*) 19 Ves. 635.

In those respects the original decree was altered with an additional declaration that *Lord Montford's* estate alone was answerable to the trustees for the increase of the fine required after a lapse of twenty-eight years.(*l*)

The last case appears to have settled the manner in which fines for renewals are to be provided, when they are directed to be paid *by trustees* out of the rents and profits of the estate assigned or devised in trust for persons in succession. It seems very difficult to reconcile with it the case of *Allan* v. *Backhouse*.(*m*) There leasehold estates held for three lives were vested in trustees to the use of *James Allan* for life, remainder to *George Allan* the elder for life, remainder to trustees for *George Allan* the younger for life, remainder in trust for his first and other sons in tail male, with remainders over; and then followed the direction to the trustees to renew the leases, with a declaration that the fines, &c. should be raised and paid out of the rents and profits of any *other* part of his freehold estate, &c. (also vested in the trustees:) and he declared that the renewed leases should be made upon the same trusts as before expressed of his freehold and copyhold estates. *James Allan* continued in possession from the year 1785 to January 1790, when he died, and was succeeded by *George Allan* the elder, who continued in possession from the latter period until his death in May, 1808; and then *George Allan* the younger (the last tenant for life) entered as next in remainder. During the possession of *George Allan* the elder in 1804, one of the lives dropped; and in 1808 another fell in, upon which *George Allan* the younger applied to the Court for its opinion and direction as to the raising the fines for the renewals. And Sir *Thomas Plumer*, M. R. then V. C. declared that the fines were to be raised by *mortgage or sale*, and that *George Allan* the younger, should contribute in proportion to the advantage he derived from the renewals.

According to that decree, *James Allan* and *George Allan* the elder were permitted to receive the whole of the rents, without contributing any part of them to the renewals which had become necessary. The present was the case of a *trust*, and the trustees were directed to raise the fines for renewals out of the rents and profits. Then according to Lord *Montford* v. Lord *Cadogan*, before stated, (and there is no difference between a renewable term for years and a lease for lives renewable,)(*n*) the trustees ought to have provided a fund out of the annual rents and profits from the year 1785, sufficient, upon a fair calculation from the usual tables of the probable continuance of the existing lives, to answer the fine upon renewal on the dropping of one of them. By this method, all the tenants for life would have received equal benefits under the trust, as must have been intended by the testator. In that case probably there would have been no occasion to resort to a mortgage or sale, which could not have been in contemplation of the testator, as he did not confine the raising of the fines to the rents of the leasehold estates, but included in the trust the rents and profits of his *other* real property. The rents of *all* his real estates were included in the trust to raise the fines, which clearly showed his intention, that by rents and pro-

(*l*) 19 Ves. 640. (*m*) 2 Ves. & Bea. 65. (*n*) By Lord *Eldon*, 9 Ves. 559.

fits he intended annual rents and profits, and which were applicable to raise the fines before any part of the *corpus* of the estates.

This seems to have been the foundation of Lord *Thurlow's* decree in *Stone* v. *Theed*,(o) in which the testator devised to trustees, a leasehold estate which he held for lives, together with all his other real property, and the residue of his personal estate, upon trust, out of the rent, and profits of the real, and the interest and produce of the personal estate, to pay an annuity to *A.* for life, and then to pay the rents and profits, and interest and produce, to *B.* for life, and from that time to pay an annuity to *C.* for life; and on further trust to pay the remainder of the rents and profits, interest and produce, to the children of *C.* for maintenance, and to convey to them the real, and pay the principal of his personal estate, at their ages of twenty-one; but if there should be no child or children, or, there being such, all of them should die under twenty-one, remainder to the plaintiff, Mrs. *Stone*. Then followed a direction to the trustees to renew the lease when necessary, and to place at interest the *overplus* rents of his real, and also his personal estate. The testator died in 1778. *B.*, the tenant for life, died in August 1780; when the plaintiff, Mrs. *Stone*, succeeded to the estate. In *May* 1780 a life dropped, and in January 1781 the trustees renewed, and paid a fine of 222*l.* 17*s.* 10*d.* Another life dropped in 1786, and in *March* 1787 a fine on renewal was paid by the trustees; which sums were satisfied out of the *rents and profits* of the aggregate fund of real property vested in them for the purpose, (the personal property not being productive.) And it was the effect of Lord *Thurlow's* decree to establish those payments: his Lordship declaring that the testator's whole property was made a general fund and one trust, and that the trustees were to use the whole estate according to the will; that the whole fund, the rents and profits, (the personal estate not being productive,) must pay the expenses of the trust; and that the produce of the whole must be first applied to the purpose of the renewals.

It seems a consequence from the last case, that if, in *Allan* v. *Backhouse*, it were not the duty of the trustees, as in Lord *Montford* v. Lord *Cadogan*, to provide out of the rents an accumulating fund for renewals; yet before a mortgage or sale of the leasehold estates was directed, the rents and profits of the testator's *other* estates should have been first applied, which appear in the argument to have been considerable; so that in this respect the two cases of *Stone* v. *Theed*, and *Allan* v. *Backhouse*, do not agree. Probably the following may be considered the rules applicable to the present subject:

First. That when leaseholds for years renewable at certain periods, are vested in trustees for persons in succession for life, with a direction to renew and pay the fines out of the rents and profits, such fines ought to be annually provided for by the trustees appropriating an accumulating fund out of those rents.

Second. That the principle of the rule seems applicable to instances where leaseholds for lives are so devised; the calculation of the period of renewal to be made as before described, the tenants for life previous to such renewal being entitled to any excess of the

(o) 2 Bro. C. C. 243.

accumulating fund in the event of a renewal not being necessary within the estimated period, and consequently obliged to contribute in aid of that fund if the time for renewal happen within the above period. But that if a renewal became necessary within a week, or a very short time after the death of the testator, so as that the fine cannot be paid out of the annual rents, it is presumed that necessity will authorize the fine to be raised by mortgage, the interest of which must be paid by the tenants for life. And,

Third. That, when not only the leasehold for lives, but *other* real estates, are devised to trustees as an aggregate fund to answer, out of the rents and profits, the fines for renewing the leaseholds, and the fund is limited in succession to several tenants for life, the *whole* of the rents must be applied in performance of the trust before any part of the aggregate fund can be mortgaged or sold for the purpose. But supposing the rents of the aggregate property in the hands of the trustees to be sufficient, and the leaseholds for lives are devised to one class of individuals, and the other estates to another class, it is conceived that the rents ought to be marshalled; *i. e.* the rents of the leaseholds and the rents of the other estates ought to contribute *pro rata* in satisfaction of the demand.

The equities of specific legatees in the marshalling of assets will appear in the Fifteenth Chapter.

CHAPTER V.

Of the Ademption and Abatement of Specific Legacies.

SECT. I. Of the ADEMPTION of Specific Legacies.
1.—*Of stock.*
2.—*Of debts or securities.*
3.—*Of goods, &c.*
4.—*Of partnership shares.*
5.—*Of leases for years and for lives.*

SECT. II. ABATEMENT of Specific Legacies.
1.—*Rule upon that subject.*
2.—*As to abatement amongst several legatees of the same specific fund,—And*
3.—*Of abatement of specific devises of freehold estates with specific legatees of chattels, under which head are considered estates* pour autre vie.
4.—*As to abatement of Legacies in part specific, and in part general.*

SECT. I. Of the ADEMPTION of Specific Legacies.

IN order to complete the title of the specific legatee to the thing given, it must be in such condition at the testator's death as *described* in his will. Such is the general rule, subject to the qualifications after mentioned.

The word "ademption," when applied to specific legacies of stock or of money, or securities for money, must be considered as synoni-

mous with the word "extinction." For it should be observed, that if stock, securities, or money, so bequeathed, be sold or disposed of, there is a complete *extinction* of the subjects, and nothing remains to which the words of the will can apply:(*a*) for if the proceeds from such sale or disposition were to be substituted and permitted to pass, the effect would be (as expressed by a learned Judge) to convert a specific into a general legacy.(*b*) But with respect to general legacies not given as portions,(*c*) the rule respecting ademption depends upon different considerations. The intention of the testator is immaterial in the ademption of specific legacies, because the subject being extinct at the death of the testator, there is nothing upon which the will can operate; but it is otherwise in regard to general legacies which are payable out of the general personal estate: there the question whether any advancement by the testator in his life time to the legatee shall be considered an ademption or in substitution of the bounty given by the will must depend entirely upon the fact, that such was the testator's intention.

It follows from the foregoing observations, that a distinction is to be made upon the present subject between legacies properly specific, and legacies in their natures only specific, *i. e.* in some respects general, and in others specific; instances of which were produced in the third chapter; for since those latter legacies do not depend upon the specific fund appropriated for their payment, the extinction of it cannot adeem such bequests.(*d*) It is now proposed to consider,—

First, The ademption of legacies that are *regularly* specific; and,

1. Of stock.

It may be considered as settled, that when stock is specifically bequeathed, and it does not wholly, or does only in part exist at the testator's death, the legacy will either be totally or partially adeemed, as the case may be. Suppose then *A.* to bequeath to *B.* 3000*l. three per cent.* consols, part of *A.'s* stock *then* standing in his name in that fund; if the stock should not be so found at *A.'s* death, the legacy to *B.* will be wholly or in part adeemed, according to the state of the property.(*e*)

Thus in *Ashburner* v. *M'Guire*,(*f*) *A.* bequeathed to the following effect; "To *B.* now at school with the reverend, &c. my capital stock of 1000*l.* in the *India* company's stock, with the dividends," &c. The fund was afterwards sold by *A.*; and Lord *Thurlow* determined, after a review of all the preceding cases, that *B.'s* legacy was adeemed.

The principle of his Lordship's decree was that before stated, *viz.* that by sale of the specific stock the legacy was *annihilated*, and there was no subject to which the description of the bequest would apply. And it appears from Sir *John Simeon's* note of the subsequent case of *Badrick* v. *Stevens*,(*g*) that a testator's *intention* to

(*a*) 3 Bro. C. C. 432. Ed. by Belt.
(*b*) 9 Ves. 360.
(*c*) See next chapter.
(*d*) Ambl. 568.
(*e*) See *Ashton* v. *Ashton*, Forrest. 152. *Evans* v. *Tripp*, 6 Mad. 91.
(*f*) 2 Bro. C. C. 108--114. also see *Sleech* v. *Thorington*, 2 Ves. sen. 561–564. *Drinkwater* v. *Falconer*, Ibid. 623. and *Humphreys* v. *Humphreys*, 2 Cox, 184. severally stated *ante*, pp. 164. 168. 163. *Birch* v. *Baker*, Mose. 373.
(*g*) Stated by Mr. Belt to that case, 3 Bro. C. C. 432. And see 2 Cox, 182.

adeem, or not to adeem the specific legacy, formed no consideration in such a case, for (said his Lordship) "the discharge of a debt (specifically bequeathed) *is not strictly* an *ademption* which *depends* upon the *intention* to adeem; but it is an *extinguishment* of the legacy by annihilation of the subject liable." This being so, let us suppose the occurrence of a case where the testator sold the stock he had specifically bequeathed; by which act the legacy became extinct; and that he afterwards purchased stock in the same fund sufficient to answer the specific bequest. Would the legatee be entitled to the stock so purchased in lieu of that which was bequeathed to him and had been annihilated? The opinions of some great Judges have been expressed in favour of the legatee;(*h*) but there is no decision upon the subject. The case of *Partridge* v. *Partridge* referred to in the last note and the only one that bears any resemblance to an authority, is that of a bequest not properly specific, but a legacy *in its nature* only specific (before described,)(*i*) and therefore does not fall within the present inquiry. Considering, then, this question upon the principles before mentioned, it seems difficult to reconcile them with the opinions above referred to. For when a testator bequeaths particular stock which he possessed at the date of his will, and not at the period of his death, it is not easy to conceive how stock, which he afterwards purchased, can pass in lieu of that identical stock of which he had by express words of reference specifically disposed. The reasons against the construction are these: first, that the testator only intended to dispose of the identical stock which he possessed *when* he made his will. Secondly, that the terms of the bequest are so framed as to extend to no other stock. Thirdly that the testator's intention to pass to the legatee the after purchased stock, in lieu of that disposed of, cannot avail, since there are no words in the will bequeathing it to him.(*k*) Fourthly, that a contrary construction would be inconsistent with the nature of a specific legacy, in allowing compensation for the destruction or non-existence of the thing specifically given; and it would confound the distinction between a specific legacy, referring to the date of the will, and one expressly referring to the testator's death. And lastly, that cases of the present description differ from those where the stock or fund, *remaining* the *same*, or the same *in substance*, was held to pass to the legatee. For these reasons, it is presumed, that when stock, which the testator had at the time he made his will, is specifically bequeathed, and is sold by him, the legacy is irretrievably gone, and that the legatee is not entitled to the benefit of any stock which the testator may have purchased in the same fund *after* the date of his will.(*l*)

From the view which has been taken of the ademption of specific legacies, it follows that the intention of a testator is not a necessary ingredient in the transaction; and that the only thing to be ascertained is, whether the stock, of which the testator was possessed when he made his will, existed at the time of his death in the

(*h*) By Lord *Talbot* in *Partridge* v. *Partridge*, Forrest. 227, by Lord *Hardwicke*, in *Avelyn* v. *Ward*, 1 Ves. sen. 426, and by Sir *Thomas Sewell*, M. R. in *Drinkwater* v. *Falconer*, 2 Ves. sen. 625.

(*i*) *Ante*, p. 150. (*k*) 2 Madd. 281. (*l*) *Vide infra*, sub. sec. 3.

state described by such will; and if not, then that the legacy is necessarily adeemed by the annihilation of the subject. Such is presumed to be the general rule. But in forming opinions upon cases according to that rule, the following distinctions or qualifications appear to require attention.

First. When the alteration of the fund is made by *mere act or operation*, of law.

If *A.* bequeathed to *B.* 3000*l. three per cent* consols, and that fund were afterwards converted into one of a different description by Act of Parliament, so that the fund and specification in the will were at variance, the conversion would not probably be adjudged an ademption of the legacy; because the alteration of the fund not having been made by the testator but the legislature, the act may not be allowed the effect of prejudicing the legatee; and since the change might neither have been foreseen, nor could be prevented by the testator, it would be unjust to permit that transaction, to defeat the disposition specifically made by his will.(*m*) Besides, the thing given is not annihilated, but exists under a different denomination, effected by the *law* alone, *quæ nemini facit injuriam.*

Secondly. The law will not permit a fraudulent transaction to operate to the injury of any person, whilst there remain any means to make reparation. Hence, a second qualification of the above rule may happen where a breach of trust has been committed, or any trick or device practised with a view to defeat the specific legacy.(*n*) Suppose, then, stock specifically bequeathed, to be sold or transferred into another fund by a trustee, without the knowledge or authority of the testator. It is conceived that such a transaction would not be permitted to defeat the bequest, upon the principle that the act of a trustee will not be allowed to prejudice the *cestui que trust*, or the persons claiming under him; and that a court of equity will consider, for the purposes of justice, the stock as still subsisting in the fund described, and answering the specification in the will. It is also presumed, that the legatee is entitled to follow the subject into other funds, or to full recompense out of the trustee's property, as the nature of the case may require. And,—

Thirdly. If the fund, instead of being annihilated, remain the *same* or in *substance* the same, as at the date of the will, with some unimportant alterations, so as not materially to change the interest which the testator then had, those slight variations will not adeem the specific bequest. According to this qualification, if stock, specifically given, be merely transferred, with the testator's consent, from the name of his trustee into his own, it has been decided that such transfer will not operate to the injury of the legatee; a decision not inconsistent with the principle which requires the stock specifically given at the date of the will, to be in existence at the death of the testator; because the stock is in fact then in existence, and was never extinguished at any period after it was bequeathed; so that, excluding any consideration of intention, the stock, specifically given, continuing in the same fund, and the property of the testator, both when he made his will and at his death, (the possession of the

(*m*) See *Partridge.* v. *Partridge*, Forrest. 226. *Bronsdon* v. *Winter*, Ambl. 59.
(*n*) *Vide* 2 Vern. 748. ed. by *Raithby.*

trustee being that of the testator,) a construction that the stock did not fall within the words or meaning of the bequest, in consequence of the mere change of the names in which it stood, *i. e.* from the name of the trustee into that of the *cestui que trust*, would be contrary to the common sense, and if not to the strict letter, to the fair meaning of the legatory words. The case referred to is *Dingwell* v. *Askew*,(*o*) and was to the following effect:

Previously to the marriage of *A.* stock was vested in trustees to her separate use for life, then to the issue of the marriage, afterwards according to her appointment by will, notwithstanding the marriage, and in default of appointment to *A.* absolutely. *A.* executed her power, and survived her husband. After which event she took a transfer of the stock from the trustees into her own name, and made no other will or disposition of it. The question was, whether the transfer was an ademption of the bequest? And Lord *Kenyon*, M. R. determined in the negative.

The last case seems also an authority, that the transfer of the fund, specifically bequeathed, into the names of *new* trustees, will not affect the specific bequest. But to proceed one step further. Suppose the trustees to be authorized by deed or will, to change securities with the concurrence of *A.* the person who was empowered to dispose, and had disposed by will of the fund, then in stock; and they, with his consent, sold the stock specifically bequeathed, and invested the proceeds upon a mortgage. Would that be an ademption? It is conceived that the transaction would not have that effect, since the change of securities being made under the authority in the original instrument, the new security (as usually declared,) is subject to the trusts expressed in that instrument, one of which was for the benefit of the testamentary appointee of *A.* Hence, the act which would in other cases have effected an ademption by extinguishing the fund, is precluded from so doing in the present instance, from the nature of the transaction springing out, and part of the original instrument. The title of the appointee, moreover, did not rest solely upon the testamentary appointment, but was also derived under the instrument imparting that power.

Fourthly. The last qualification of the rule which will be noticed, occurs in instances where the testator lends the stock, specifically bequeathed, on condition of its being replaced. Cases of this kind are analogous to those where a cup, or other article, specifically given, is afterwards pledged by the testator, and continues so till his death; a circumstance which, we have seen, instead of being an ademption, entitles the legatee to have the subject redeemed by the executor, and delivered according to the bequest.(*p*) So in the present instance, the testator continues owner of the stock, notwithstanding the loan of it; and although it be not literally existing in his possession at his decease, yet he is in fact substantially and beneficially possessed of it at that period, and it is presumed that the transaction would not adeem the prior specific disposition of the fund.

(*o*) 1 Cox Rep. 427. and see Ambl. 260. 3 Bro. C. C. 416. Mose. 373-376.
(*p*) *Supra*, p. 229. and 2 Bro. C. C. 113.

2. Of debts or securities.

The rule requiring the existence of the subject, as specified in the will, at the testator's death, equally applies to specific legacies of debts or securities as to stock. It therefore may be stated as a general proposition, that if the debt specifically given be received by the testator, the bequest of it will be adeemed, since the subject is *annihilated*, and the proceeds do not fall within the description in the will.

In *Birch* v. *Baker*,(*q*) *A.* being entitled under the will of *B.* to half of two-thirds of *South Sea* stock, *India*, *Bank*, and *Orphan* stock, leases, *East India* and *South Sea* bonds, mortgages, &c. bequeathed her share to trustees for the benefit of *C.* after payment of 200*l.* to *D.* A division was then made between *A.* and the other legatee of *B.* of their shares under *B.*'s will, and *A.* received her moiety, consisting of several of the above securities, some of which she afterwards sold, and blended the proceeds with her other property. And Sir *Joseph Jekyll*, M. R. decided that the sales were ademptions.

So also in *Rider* v. *Wager*,(*r*) *B.* specifically bequeathed to *D.* part of a debt due to him from *C.*, and the remainder of it to *E.* *B.* called in the money; and Lord *King* determined that the legacy was extinguished.

In the last case, *B.* also bequeathed to *F.* a debt which *F.* owed to him. *F.* paid the money to *B.*, and the legacy was held to be adeemed.

In *Ashburner* v. *M'Guire*, before stated,(*s*) the bond-debt, specifically bequeathed by *A.* to his sister and her children, was reduced by the bankruptcy of the obligor, under whose commission *A.* received a dividend in respect of the debt. Lord *Thurlow* decided, that the dividend received by *A.* was an ademption *pro tanto*, but that the legatees were entitled to the bond, and to subsequent dividends.

That case was followed by *Badrick* v. *Stevens*, in which Lord *Thurlow* made a similar decision.(*t*)

So also in *Stanley* v. *Potter*, decided by the same Judge, and to be found in a preceding page,(*u*) his Lordship adhered to the two last authorities; observing, that when the case of *Ashburner* v. *M'Guire* was before him, he used his utmost endeavours in sifting all the preceding cases, and discovered that no certain rule could be drawn from them, except to inquire whether the legacy was specific (generally *the* difficult question in those cases;) and, if specific, whether the *thing remained* at the testator's death. His Lordship then remarked, that the consideration must be, as if a testator had given a particular horse to *A.*, and then, if that horse died during the life of the testator, or was disposed of by him, there was nothing upon which the bequest could operate. It was his opinion, that the question in the cases did not turn on the *intention* of the testator, and that the idea of proceeding on the *animus adimendi* had

(*q*) Mose. 374. (*r*) 2 P. Will. 329, 330. 332.
(*s*) *Supra*, p. 173. and 2 Bro. C. C. 108-114.
(*t*) Case stated *ante*, p. 183. and 3 Bro. C. C. 431.
(*u*) *Supra*, p. 174. and 2 Cox, 182.

introduced a degree of confusion in the cases which was inexplicable, and that he could make no precise rule from them upon that ground.

Next followed the case of *Fryer* v. *Morris*,(*x*) before partially stated,(*y*) in which the testatrix received 385*l.* 18*s.* of the debt on note specifically bequeathed by her, and placed the money in the hands of *B.* and *C.*, bankers; of which sum she drew out 10*l.* And Sir *William Grant*, M. R. determined, that the receipt of the former sum was an ademption, in conformity with the preceding cases, and the principle established by them, *viz.* that the thing given and described no longer existed.

It appears from early cases, that several Judges expressed opinions not only that in the ademption of specific legacies, the testator's intention to do so was essential, but also that such intention was sufficiently manifested, in the distinction where a testator received a debt specifically bequeathed at his own instance, and where the debt was paid to him without his application; such opinions expressing in the former cases, that receipt of the debt amounted to an ademption, and that in the latter, payment was no ademption. These opinions were founded upon the following reasoning: that if, after the specific bequest of a debt, a testator, upon application or by compulsion, obtained it, an inference arose, that by extinguishing the demand he intended to defeat the legacy. But that when a testator, without solicitation, and *ex mero motu* of the debtor, or in the regular course of payment, received the debt specifically bequeathed, as no inference could be made that by such receipt he intended to defeat his prior disposition, the non-existence of the debt at his death, under such circumstances, should not be allowed to disappoint the specific legatee.(*z*) The fallacy of this distinction was soon discovered; for it is not true that in all cases where a testator applies for, or compels payment of his debt, he is induced to do so from an intention to defeat a prior testamentary disposition of it, but from prudential motives, such as the apparently declining circumstances of the debtor, and the like. These opinions were therefore rejected, and were succeeded by those expressive of the legacy's ademption, whether it was voluntarily or of necessity received by the testator; and upon the clear principle, that the subject being *extinguished*, the specific bequest of it could not possibly take place. This change of opinion began in the cases below referred to;(*a*) and was approved and acted upon by Lord *Thurlow* in the cases of *Ashburner* v. *M'Guire*,(*b*) *Badrick* v. *Stevens*,(*c*) and *Stanley* v. *Potter*,(*d*) before stated and referred to. In the case of *Innes* v. *Johnson*,(*e*) Lord *Alvanley* M. R., after observing that there was no occasion to enter into the distinction, as to ademption, between

(*x*) 9 Ves. 360. (*y*) *Supra*, p. 176.

(*z*) See *Orme* v. *Smith*, 1 Eq. Ca. Abr. 302. 2 Vern. 681. *S. C. Partridge* v. *Partridge*, Forrest, 228. *Crockat* v. *Crockat*, 2 P. Will. 165. *Rider* v. *Wager*, ibid. 330. *Ellis* v. *Walker*, Ambl. 311, and the observations of Lord *Camden* on most of those cases, in the *Attorney General* v. *Parkin*, Ambl. 569.

(*a*) Earl of *Thomond* v. Earl of *Suffolk*, 1 P. Will. 464. *Ford* v. *Fleming*, 1 Eq. Ca. Abr. 302. 2 P. Will. 469, *S. C. Ashton* v. *Ashton*, 3 P. Will. 385. Forrest, 152. *S. C.* and *Hambling* v. *Lister*, Ambl. 402.

(*b*) 2 Bro. C. C. 108. (*c*) 3 Bro. C. C. 431.

(*d*) 2 Cox, 180. (*e*) 4 Ves. 574.

a voluntary payment by the debtor, and one by compulsion of the testator, said, had that consideration been requisite, he should have agreed with Lord *Thurlow*, that it made not the least difference. And in *Fryer* v. *Morris*,(*f*) Sir *William Grant* decided, that a voluntary payment of part of the debt to the testatrix, was an ademption *pro tanto*. Upon the whole, it may be considered as the settled rule of the Court of Chancery, that under whatever circumstances the debt specifically bequeathed, is received by the testator, an ademption will be effected, upon the principle before stated, that the subject is annihilated, and nothing remains upon which the terms of the bequest can operate. This proposition was confirmed by Lord *Thurlow's* decree in *Humphreys* v. *Humphreys*,(*g*) in which *A.* being possessed of 5000*l.* stock, bequeathed it to *B.* and *C.* in these words: "All the stock which I have in the three per cents, being about 5000*l.* except 500*l.* which I give to *C.*" He then devised other specific parts of his property to be sold, and directed the produce to be applied in discharge of a mortgage debt owing by him. After this, *A.* sold 2000*l.* of the stock, and paid off the mortgage with the proceeds; an act which Lord *Thurlow* held to be an ademption of the legacy *pro tanto;* observing, that he was satisfied, from the consideration he had given to the cases on a former occasion, that the only rule to be adhered to was, to ascertain whether the subject of the specific bequest remained *in specie* at the death of the testator; and if it did not, that then there must be an end of the bequest; that the idea of discussing *what were the particular motives and intention* of the testator in each case, in destroying the subject of the bequest, would be productive of endless uncertainty and confusion; and that therefore, so far as concerned the 2000*l.* stock sold by the testator, the legacy was gone.

These authorities were followed by Sir *John Leach*, V. C. in *Barker* v. *Rayner*,(*h*) in which *Walter Hammond* effected two policies of insurance upon the life of his wife; the one for 600*l.* and the other for 1500*l.* payable to himself, his executors, &c. within six months after his wife's death. By his will he gave all his right, title and interest in the policies, the policies themselves, and all benefit and advantage thereof to his executors and trustees, to pay the yearly premium during his wife's life, and after her death, he directed certain payments to be made out of the money to be received, and the remainder to be placed out upon securities at interest, and disposed of the principal and interest by the will. The testator survived his wife, who died after the will was made, and he received the amount of the policies, and after applying part of the money to particular purposes, he placed out at interest the remainder upon securities, which were left in the hands of the executors. The question was, whether under those circumstances, the specific testamentary disposition of the policies was adeemed? And the determination was in the affirmative, upon the principle that the things specifically given, were *extinguished* and gone at the death of the testator. And the Court said, "it was only to inquire whether *the specific things remained* at the testator's death, and it could not en-

(*f*) 9 Ves. 360.
(*h*) 5 Madd. 208.

(*g*) 2 Cox, 184, and *supra*, *p.* 163.

ter into the consideration whether they had or not ceased to exist by an intention to adeem on the part of the testator."

Such being the general rule, we shall advert to some instances not falling within it, and in which, consequently, they were no ademptions.

A case of that description is *Crockat* v. *Crockat*,(*i*) in which *A.* bequeathed the sum of 550*l.* then in *B.'s* hands. It appeared that before the will was made *A.* had placed that sum with *B.*, and obtained his note for it. *A.* had also, *before* the making of his will, drawn several bills upon *B.*, which reduced the 550*l.* to 430*l.* And it was held by the *Master of the Rolls*, that in this case there was no partial ademption, but that the whole legacy was payable; upon the principle, that since all the bills were drawn *before* the date of the will, and as the note for the full sum of 550*l.* was outstanding at *A.'s* death, he should be considered as renouncing the payments, and that he meant to give the whole sum as a legacy. Or in other words, the note having been specifically bequeathed and in force when the testator died, the drafts drawn upon its credit placed it in the condition of a thing *pledged* or mortgaged, a situation which imposed an obligation upon the executor to redeem and deliver it to the legatee. That seems to be the solid ground of decision.

So also when an arrear of interest due upon a debt at the date of the will is specifically bequeathed, and the testator afterwards receives interest upon the principal sum, such receipt will not be an ademption, if it appear that he appropriated the payment in discharge of interest accrued *after* the making of his will; for although the money so received be *primâ facie* applicable in discharge of the interest which *first* became due, yet the creditor is permitted to appropriate it in payment of the interest accrued after the date of his will, so as to leave the arrear owing when the will was made, and specifically given, unliquidated, and consequently in existence at his death. But the *onus* of proving that intention falls upon the legatee.

Thus in *Graves* v. *Hughes*,(*k*) *A.* being entitled to a debt on mortgage with an arrear of interest, after reciting in her codicil that the then arrear was 600*l.* and upwards, according to her own computation, bequeathed it to *B.* and *C.* It appeared from the Master's report, that the exact amount of interest due when the codicil was made amounted to 646*l.* 8*s.* 3*d.* *A.* continued to live during eleven years after the codicil, and received for interest 648*l.*, which sum if applied in discharge of the interest due when the codicil was made, would have adeemed the legacy. But the Master found and reported upon the affidavit of *D.* that the money paid to *A.* after the codicil, was received by her in discharge of the interest which became due *subsequently* to the date of that instrument; and under the above circumstances it was determined, that the arrear of interest which was owing when the codicil was made still *remained*, and was consequently the property of the specific legatee.

Another class of cases not falling within the general rule applicable to ademptions, is where a testator shows an intention that the legacy should not fail although the debt *specifically* given be discharged during his life, by providing for that circumstance. In those

(*i*) 2 P. Will. 164. (*k*) 4 Madd. 383.

instances the bequests are specific *quoad* the debt, and general so far as it is necessary to resort to the assets upon the annihilation of the whole or any part of such debt. And although a testator in providing for the event of the debt's discharge may have expressed himself imperfectly, a court of equity will nevertheless effectuate the visible intention, and supply the imperfection.

Accordingly, in the case of the Earl of *Thomond* v. The Earl of *Suffolk*,(*l*) *A.* being possessed of two bonds, the one for 2000*l.* from *B.* her grandson, and the other for 2000*l.* from *C.* her grand-daughter, bequeathed both securities to *C.* and declared, that if all or any part of the two sums should be *paid in* before her death, *C.* should have 4000*l.* or so much money as the principal *so paid in* amounted to. *A. released* to *B.* his bond debt, without receiving any of the money. And the question was, whether, as the specific legacy of the bond was so adeemed by the *release*, *C.* was, notwithstanding, entitled to the amount out of *A.'s* assets, under the declaration in her will, although literally and strictly the debt was *not paid in;* the only event (according to the natural import of those words) in which the value of the bond was directed to be paid out of the general estate? And Lord *Parker* considered the intention to be clear, that if either bond were not in existence at the testator's death, the legatee should have the amount out of her estate. His Lordship also considered the release as implying *payment* of the debt, and equivalent to the receipt and return of it by the testatrix, and the same as if the will had said, "if these debts be paid or discharged."

The last class of cases to be noticed as not falling within the general rule of ademptions, is where the terms of the bequest are so comprehensive as to include within their compass the fund specifically bequeathed, although it has undergone considerable alteration since the date of the will. For, since the substance of the thing given, viz. the debt or money *remains*, and the subsequent alteration of security does not prevent it from answering the description in the will, the principles upon which the ademption of the specific legacies is founded do not apply. In illustration of the present subject; suppose *A.* to have notes and cash in the hands of *B.*, and to bequeath to *C.* the *value* of his estate *then* in the possession of *B.* If the notes and cash so specifically bequeathed be changed into exchequer bills, or bonds, or mortgages, and be in the hands of *B.* at *A.'s* death, the alteration of securities will not adeem the bequest; because the property which *A.* had in the custody of *B.* at the date of the will, *remained* from that time in *B.'s* possession to the death of *A.;* and the exchequer bills, bonds, or mortgages, answered the description of *value*, the specification of the fund in the will. Upon these principles Lord *Thurlow* decided the following case:

In *Pulsford* v. *Hunter*,(*m*) *A.* by codicil of *December* 1779, after giving two small annuities, bequeathed as follows: "this is an account of *value now*, in my possession, and out of which the said yearly sums are to be paid; bank notes to the amount of 190*l.* cash 10*l.* 10*s.*, ditto in the hands of Mr. *Drummond* 2476*l.* 5*s.*, 2676*l.* 15*s.*; the interest of the remaining part to be applied for the use and education of my grand-children, till they arrive at the age of twenty-one, and

(*l*) 1 P. Will. 462-464. (*m*) 3 Bro. C. C. 416.

the principal to be then equally divided amongst them," &c. It appeared that *A.* had no cash in possession at his death; but that he was possessed of two bank notes amounting to 30*l.*; also, that *Hunter* in *January* 1779, and at *A.'s* request, left with Messrs. *Drummond* two navy bills, the property of *A.*, to the amount of 2462*l.* 5*s.* 4*d.*; and that in *August* 1790, government discharged the navy bills and interest with seventeen exchequer bills of 100*l.* each, and with 921*l.* 1*s.* cash, making a total of 2621*l.* 1*s.*; which exchequer bills remained in the hands of Messrs. *Drummond*, in the name of *Hunter*, and the 921*l.* 1*s.* placed to his account; that in *September* 1780, *Hunter* drew a draft on *Drummond* for 21*l.* 1*s.* in favour of the testator, which was paid; and he afterwards took out the remainder of the sum, and bought nine other exchequer bills of 100*l.* each, and left them with *Drummond* in his own name, which made up twenty-six exchequer bills; that afterwards sixteen of the bills were deposited with *Drummond* at the testator's request, in his own name, and the remaining ten bills were paid to *Hunter* and another person, in satisfaction of a debt of 1000*l.*; and it appeared that the testator never had any property, in the hands of *Drummond*, in his own name, except as before stated. It was one of the questions, whether, as at the time of the bequest the property in the possession of *Drummond* was navy bills, and had been subsequently altered in the manner before mentioned, the legacy was not adeemed; or, whether the grand-children were entitled to the sixteen exchequer bills remaining in the hands of *Drummond* at the death of the testator? And Lord *Thurlow* determined in their favour; observing that the question in these cases was, whether the specification of the thing bequeathed remained the same at the testator's death as it was at the *time of the bequest.* If, therefore, the present had been a bequest of navy bills, he must have thought that the grand-children could not have taken the exchequer bills, because the specification was not the same. The thing given would not have been in existence at the testator's death, but that the word in the codicil, was "*value*," a description answered by the exchequer bills which *remained*, and were value in the hands of *Drummond;* his Lordship, therefore, determined as above.

3. We shall next consider the ademption of specific legacies of goods, &c.

It was shown in the fourth chapter,(*n*) that if the terms of the bequest referred to specific articles in the possession of the testator when he made his will, those only would pass which he *then* had;(*o*) and that if the testamentary words related to the period of his death, goods, &c. which were in his possession at that time would be included.(*p*) Hence there appears to be a distinction between those two cases in relation to ademption, in the latter every article disposed of between the date of the will and the death of the testator will be an ademption; but if they be replaced by others, or be increased, the new articles will pass to the legatee, because they answer the description of the bequest: but it is otherwise in the former case, where the gift is limited and confined to such goods only as belong-

(*n*) *Supra*, p. 222. (*o*) Ambl. 281. (*p*) 2 Vern. 688.

ed to the testator at the date of his will, for by the disposition of any of them the subjects specifically bequeathed are to that extent annihilated; and as the words of the bequest do not include articles afterwards acquired, they cannot pass in substitution of or in addition to those sold or disposed of. The observations which have been made in considering the ademption of specific legacies of stock and debts equally apply to the present subject of goods.

In *Green* v. *Symonds*,(*q*) the testator bequeathed to *C.* all his books at his chambers in the *Temple*. He afterwards removed his books into the country, and the act was held to extinguish the legacy.

So also in *Heseltine* v. *Heseltine*,(*r*) the bequest was of "all the testator's household goods, plate, linen and china, and all the wine and other liquors, goods and chattels whatsoever, which should be in or about his dwelling house at *B.* and *C.* at the time of his death; and also his coach and other carriages, with his horses and all his live stock at *C.*" After this the testator took a house in *D.* and removed to it the greater part of the furniture from his house at *B.* The removal was adjudged to be an ademption.

The last two cases were determined upon the personal acts of the testators. But the effect will be the same if the removal of the articles specifically bequeathed be by an agent officiating under a general authority, and the act meet with the approbation of a testator; and probably without the appearance of any such approval, for the act of such an agent is that of the testator.

Accordingly in the case of *Shaftesbury* v. *Shaftesbury*,(*s*) *A.*, before he went abroad for the benefit of his health, bequeathed to his wife all the plate, &c. which should be in his house at *C.* at the period of his death. During the absence of *A.* his steward, acting under a general authority, procured the absolute owner of the house to accept a surrender of *A.'s* lease, and in consequence the steward removed *A.'s* plate, &c. to another house belonging to *A.*; a transaction afterwards approved of by *A.* And the question being whether the removal of the plate, &c. was an ademption of the legacy, it was decided in the affirmative.

The general rule that goods specifically bequeathed must be in the place described at the death of the testator, may be inapplicable to some cases, so that their removal during his life will not create an ademption. The principle seems to be this,—that the bequests of the articles must be supposed to be made, subject to the several accidents and contingencies to which they are exposed. In which cases, if by any of those accidents or contingencies, the goods, by removal, do not literally answer the specification in the will, a court of equity will, notwithstanding, consider them as being in the house or place at the testator's death. This appears to be the true principle of the authorities upon the subject.

A qualification or exception to the general rule appears, therefore, to occur when the goods specifically given are removed out of the house described for the sake of preservation from fire,(*t*) an accident for which they were liable to be removed when the will was made.

(*q*) 1 Bro. C. C. 129, in a note.
(*s*) 2 Vern. 747. Ed. by Raithby.
(*r*) 3 Madd. 276.
(*t*) 1 Ves. sen. 273.

So also it would seem, that if the goods were removed by fraud, or without the testator's knowledge or authority, the act would not be permitted to adeem the specific bequest of them, as may be collected from the declaration in the decree pronounced in the case of *Shaftesbury* v. *Shaftesbury*.(*u*)

Another probable qualification to the above rule, and founded upon the principle before stated, may happen, when, from the nature of the place in which the goods are specified to be, it is considered that the locality of them was not referred to as essential to the bequest, but as merely descriptive of the articles meant to be given, and substituted in lieu of a schedule particularizing them. In conformity with this remark, Lord *Hardwicke*, in the case of *Ward* v. *Turner*,(*x*) took a distinction between goods in a *house* and goods in a *ship*; observing that a bequest of goods on board of a ship, must be supposed to be made with a view to the several accidents and contingencies to which they were liable; and that should it be determined that if by any accident the goods should not be on board at the testator's death, they should not pass, such a decision would defeat several marine wills. His Lordship then remarked, that if the goods were removed for preservation, as if the ship were leaky or likely to founder, or if the testator were removed to another ship (his goods of course accompanying him) a contingency to which he was daily subject, and an order which he could not resist, neither of those circumstances would adeem the specific bequest he had made of them.

Under the present qualification or exception to the general rule, those instances may be classed, where, for example, a person having two houses *A.* and *B.* at which he alternately resides, and being possessed of only *one* set of furniture, which he removes with himself to each house, bequeaths, whilst living in *A.* "all his furniture at *A.*" to *C.* Although the whole of the furniture may be in house *B.* because the testator happened to die there, yet the *accident* of his being resident in that house at the time of his death, with the furniture, will not be an ademption of the legacy. For under the above circumstances the locality of the furniture at house *A.* at the period of his decease, was not of the essence of the legacy; the bequest being made with a view and consideration of the accident of their being in house *B.* at the death of the testator; so that the disposition was nothing more in effect than a specific bequest of his household furniture. Upon such reasoning as above, Lord *Thurlow* made the following decision:

In *Land* v. *Devaynes*,(*y*) *B.* after bequeathing to his wife 1000*l.* devised to her "all his plate, linen and furniture in his house in *S.*" together with the lease of the said house for the residue of the term. *B.* had two houses, that in *S.* and another in *T.* at each of which he resided alternately. When he made his will his plate, linen and furniture were in the house at *S.* except sufficient linen to serve the family for one week without washing, which were in the house at *T.* It appeared that *B.* had only one service of plate, which, with all the linen, except sufficient for one week's use without washing, always accompanied himself and family from one house to the other, when

(*u*) Stated by Mr. Raithby in a note to that case, 2 Vern. 748.
(*x*) 2 Ves. sen. 431. (*y*) 4 Bro. C. C. 537.

they changed their residence. There happened to be no plate in the house at *S.* at *B.'s* death, except a silver bowl, but his widow, the legatee, not only claimed the linen and furniture which were in that house at the last mentioned period, but also such plate, linen and furniture as were in the house when he made his will, or such as at that time he had been in the habit of using in his house at *S.* during his residence there, and which were carried backwards and forwards between the two houses, as he resided in either. Lord *Thurlow* said, that *B.* having only one set of plate and linen, which was not sufficient for both houses, was accustomed to remove them with himself, it was therefore like a general devise of all his plate and linen, and his Lordship ordered all the plate to be delivered to the widow, and also all the linen, except the linen for the week that was left at the house in *T.*

It was before noticed that when goods are specifically given, the rule is general that they must be in the testator's possession at his death, so that if he disposed of any of them, the legacy would be so far gone.(*z*) But this qualification must be observed, that if the disposition be not absolute, it will not have the above effect, as where a testator pawns or pledges an article specifically bequeathed, a right of redemption is left in the testator, and passes to the legatee at his death, and that interest entitles him to have the subject redeemed out of the general assets of the testator.(*a*)

It is to be further remarked, that when a specific legacy of property which the testator had at the date of his will is once adeemed by extinction of the subject, and there is nothing remaining to which the words of the bequest can apply, the mischief cannot be remedied by a simple republication and confirmation of the will.(*b*) But it would seem that republication might have an effect favourable to the legatee, if after the ademption of the legacy and before the republication, the testator acquired property to which the words of the will could be applied. Suppose, then, the legacy to be of goods or stock of which the testator was possessed at the date of his will, that he sold them and invested the proceeds in the purchase of other goods or stock and afterwards to republish and confirm his will by a codicil; it is presumed that the republication, although unable to revive that which was extinct, would nevertheless entitle the legatee to the new articles; first, because the terms of the bequest are sufficient to embrace them, and secondly, because, by the republication, the will is made to speak from the date of the codicil.(*c*)

4. Since the situation or locality of goods specifically bequeathed, may, as we have seen, be such as to exempt them from the rule which requires their being found at the testator's death at the place described in his will, so may the nature of the subject have a similar effect, according to a decision of Lord *Hardwicke.* To illustrate this in the instance of partnerships. It has been determined that if a partner, under articles providing for their renewal, specifically be-

(*z*) *Supra*, p. 189. 246. (*a*) Swinb. p. 525. 2 Bro. C. C. 113.

(*b*) 2 Ves. sen. 626. and *Monck* v. *Monck*, 1 Ball & Beat. 306. *Chesslyn* v. *Cresswell*, 3 Bro. Parl. Ca. 246. 8vo. ed.

(*c*) *Coppin* v. *Fernyhough*, 2 Bro. C. C. 292. a decision of Lord *Thurlow* overruling the *opinion* of Lord *Hardwicke* in *Abney* v. *Miller*, 2 Atk. 599. See also 2 Ves. sen. 419.

queathed his share of the profits (naming the *amount*,) and upon the expiration of the old, new articles are entered into, by which his share of profits is altered, the legacy will not be adeemed. The principle of this decision has been before stated, viz. that it is to be presumed from the nature of the property, that the bequest was made in contemplation of the determination and renewal of the old articles, and an alteration in the shares of the partners, and that therefore since the subject bequeathed always continued in the same fund, its amount alone being altered, and the new articles being a continuation of the old, it would be unreasonable and contrary to the testator's intention when he made his will, and also to the nature of the transaction, to hold it an ademption of the specific bequest. On this opinion was Lord *Hardwicke* in the case of *Backwell* v. *Child*,(*d*) which was to the following effect:

A., *B.* and *C.* were partners in the banking business under articles made in the year 1743. *A.*, after reciting in his will that he had reserved to himself by the articles, nine in twelve parts of the profits to arise by banking in his house at *T.*, did (in pursuance of the power also reserved thereby) dispose of such nine parts in manner following: one ninth part to *B.* and *C.* in addition to the shares they were entitled to under the articles, as a recompense for the trouble they should incur in carrying on the banking business for the benefit of his wife and children; another ninth part to his wife; three ninths to his eldest son; and four ninths to his two youngest sons. The articles of 1743, expired after the date of the will, and *A.* entered into new articles with *B.* and *C.* at the end of a year afterwards, by which the business was divided into twenty-four parts or shares, and fourteen of them were declared to belong to *A.*, seven to *B.* and three to *C.* There was a provision *in the articles of* 1743, that if any of the partners died during the partnership under those or any future articles, the shares of the persons so dying should belong to their executors. There were also secret, or, what are called, side-articles entered into by them, but no new ones were made when the parties entered into the last articles. Upon a question whether the second articles were an ademption or a revocation of *A.'s* will, Lord *Hardwicke*, determined, that they were not, observing, that although the fund was *altered* and *differently arranged*, it was in fact subsisting at *A.'s* death, and his Lordship said, "that when a person in trade makes provision *out* of his share for his family, and afterwards renews the partnership, by which perhaps his interest is varied, yet it is not a revocation; if it were, it would occasion great confusion."

5. With respect to the ademption of specific devisees of lands held under leases for terms of years or for lives, by the subsequent surrenders of the old leases for the purpose of renewal, the following rules and distinctions may be collected from the cases determined on the subject.

FIRST,—As to leases for *terms of years*.

The same rule which requires the existence of the thing specifically bequeathed, at the death of the testator, and before so frequently exemplified, equally applies to the subject now under consideration. The only question to be settled is, whether the words of the

(*d*) Ambl. 260. See also *Ellis* v. *Walker*, ibid. 309. and stated *ante*, p. 155.

bequest merely refer to the identical lease or term for years which the testator was possessed of when he made his will, or whether they are sufficiently comprehensive to include such estate in the lands which the testator should have in them by renewal or otherwise at the period of his death. In the first case an effective surrender of the lease will adeem the legacy; and in the other, the bequest will not be disappointed. It, therefore, will be useful, first to consider the expressions which have been adjudged to be restrictive of the bequest, to the lease or term that the testator had at the date of his will, and secondly, those which have been considered large enough to comprise all the interest he had in the lands, at his decease, however altered or modified after the making of his will.

1. When the surrender of a lease specifically bequeathed, will effect an ademption.

An examination of all the cases upon the present subject, appears to establish the following rule: that when a testator, in disposing of lands in which he is possessed of the *legal* estate for the residue of a term of years, expresses himself in the *present* tense, and all the words directly refer to the term or lease of which he was then possessed, none of them having a prospective import, referring to his death; and there is nothing apparent upon the face of the will, to show a clear intention that he used the words in any other sense than they grammatically and legally import; the term, lease, and interest only which he had when he made the bequest will pass to the legatee. Hence it follows, that his surrender of the lease will adeem the legacy, by annihilating the subject of the gift. And since the expressions in the will embrace no other interest than that extinguished, a new term acquired by the testator upon a renewal of the surrendered lease, cannot pass to the specific legatee. It must, however, be noticed, that the surrender of the old lease must be effectual, or there will be no ademption. And it is conceived that the above observations will be supported by the following authorities:

Thus, in *Abney* v. *Miller*,(e) *A.* bequeathed all his college leases which he *then* held of *Magdalen* College to *E.* to be sold immediately after his death, with directions to divide the proceeds amongst several persons, including *E.*, and *A.* appointed *E.* executrix and residuary legatee. *A.* afterwards surrendered his college leases, and accepted two new ones, the one in *December* 1736, and the other in *August* 1740. *A.* paid large sums of money for fines, but the last lease was not sealed with the college seal till after his death. The question was, whether the specific devise of the old leases was adeemed by their surrender and acceptance of the new. And Lord *Hardwicke* determined that the surrender of the old, and acceptance of the new lease in 1736, was an ademption, because the words of devise being in the *present* tense, and therefore only applicable to the lease then in existence, could not possibly comprehend the renewed lease. But as to the new lease of 1740, his Lordship decided, that as it was void for want of the college seal, the devise of the old one was not adeemed by the mere *attempt* of *A.* to renew.

The last case was followed by that of *Rudstone* v. *Anderson*,(f) in

(e) 2 Atk. 593. 597.

(f) 2 Ves. sen. 419.

which *A.* devised in the following words: "All my lands, tenements, and hereditaments at *Westow* in *Yorkshire*, and all my *tithes* and ecclesiastical dues payable out of *Westow* aforesaid, or any other towns or places near the same," I give to *B.* At this time *A.* was seised in fee of her estate at *W.* and possessed of a *lease* of the tithes there under the Archbishop of *York*; but she afterwards surrendered that lease and took a new one, and of which she died possessed. The only question was, whether the devise of the tithes was adeemed by the surrender of the old lease? And Sir *John Strange*, M. R. decided in the affirmative, and remarked, that he saw no distinction between the words in the will, "all my tithes at *Westow*;" and if they had been "all my lease or *interest* in that lease at *Westow*," because the latter words must refer to the interest *A.* had at the time of making her will; which interest being extinguished by the surrender, the *new* estate in the tithes which she acquired by the subsequent lease, could not pass under the description in the bequest, without the aid of a *republication* of the will.

Similar to the last authority was the case of *Hone* v. *Medcraft*,(*g*) where *A.* bequeathed to *B.* "the perpetual advowson and disposal of the living or rectory of *Waverdon* for ever, together with the tithes of all sorts thereof. The rectory was held by a lease under *New College*, *Oxford*, for a term of ten years from 1766; which *A.* surrendered after the date of his will; and *A.* took a new lease in the year 1770 for ten years, and died before its expiration. One of the questions was, whether the advowson passed by the will, or the devise of it was adeemed by the surrender of the old lease, and the acceptance of a new one? And Lord *Thurlow* determined that the legacy was extinct; remarking, that he had read *Abney* v. *Miller*, and all the other cases on the subject, and discovered that he must contradict all of them, if he did not construe the present devise of the leasehold estate, which was afterwards surrendered, a lapsed devise.

It appears that the preceding cases were decided upon expressions, that from their import could not be considered as relating to any estate or interest, but that which the testators were possessed of under the then existing leases. But the case next stated proves the following proposition; that however general the terms of bequest may be, yet, if instead of having a prospective view, so as to embrace any interest the testator may have in the subject at the period of his death, they merely relate to, and are satisfied by the interest which he had and devised at the date of his will; such terms or expressions will not prevent an ademption by the surrender of the old lease, and pass to the legatee the new estate acquired in the subject by the testator, after the devise by renewal or otherwise. In illustration of this, suppose *B.* to devise to *C.* his leasehold house in *D.* and *all* his *estate*, *term*, and *interest therein;* the latter general words would be referred to, as they are satisfied by the identical estate, term, and interest, which *B.* had in the house at the period of the devise, and a subsequent surrender of the lease by the testator would be an ademption of the legacy.(*h*)

(*g*) 1 Bro. C. C. 263. (*h*) See *James* v. *Dean*, 11 Ves. 383–387. 395.

Accordingly, in *Slatter* v. *Noton*,(*i*) *A.* devised to *B.* her leasehold garden and the stable adjoining her dwelling-house, during his life, with remainder to his children; but if he died without issue, she then gave the said garden and stable, and "all her estate, term, and interest therein" to *C.* absolutely. With respect to the dwelling-house, *A.* bequeathed it to *D.* for life, with remainder to his children; and if he died without issue, then she gave her said dwelling-house, and "all her estate, term, and interest therein," to *E.* and *F.* absolutely. The premises were held by the testatrix under lease from the corporation of *Winchester*, which she surrendered and took a new lease for forty years; and the question was, whether the specific devise was affected by the surrender and renewal of the lease? And Sir *William Grant*, M. R. determined that the legacy was adeemed, upon the principle, that *A.* having expressed herself in the *present* tense, (none of the words being prospective to take in any interest which she might subsequently acquire in the house, stable, &c.) the terms were referrible to no other estate in the house, &c. than what she possessed under the lease existing at the date of the will.

In the last and similar cases, if the wills had been republished, the ademptions created by the surrenders of the old leases, would, as it is presumed, have been remedied in the acceptances of the new, since the effect of republications is to make the wills speak from the dates of the codicils, as before observed,(*k*) which being subsequent to the renewals, and the renewed interests falling within the terms of the bequests, there appears to be no reason to prevent those interests from passing to the legatees. Such was the opinion of Sir *John Strange*, M. R., in *Rudstone* v. *Anderson*, before stated;(*l*) and so Lord *Thurlow* determined in *Coppin* v. *Fernyhough*,(*m*) which was a case to the following effect:

A. being seised of a freehold farm, called *C.* farm, and possessed of the manor of *D.* under a lease from the prebendary of the prebend of *D.* for twenty-one years, which was usually renewed every seven years, bequeathed to his daughter an annuity charged on *C.* farm, and upon all his leasehold estates in the parish of *D.*; and he devised the same, subject to the annuity, to the same uses, &c. as were declared of his freehold lands, limited in strict settlement by a prior instrument. The testator renewed the lease which existed at the date of his will, and purchased a lease for three lives of other lands, and then made a codicil, devising his purchased estate to trustees, &c. It was one of the questions, whether, if the renewal of the lease of the manor of *D.* were an ademption of the specific devise, the will was not republished by the codicil, and the renewed lease did not pass to the specific legatee? And Lord *Thurlow* determined, that by the codicil, the will was republished, which enabled such will to pass the renewed lease: a decree necessarily admitting that the renewal was an ademption of the specific legacy.

It is observable that the preceding cases, in which ademptions were effected by surrenders of the old leases, were cases where the *legal* estate in the terms, was vested in the testators, and not in other persons in *trust* for them. In instances of the latter kind,

(*i*) 16 Ves. 197. (*k*) *Supra*, p. 250. (*l*) p. 250.
(*m*) 2 Bro. C. C. 292, and see *Carte* v. *Carte*, 3 Att. 175--180.

Lord *Hardwicke* has expressed a clear opinion, that what would be an ademption at law, the *legal* interest being in the testator, will not be so in equity, when the testator is merely entitled to the *equitable* interest; and his Lordship observed,(*n*) that an abundance of acts were sufficient to pass the *trust* or *equitable* interest, which would not pass it at law. The principle appears to be this: that when the subject is purely legal, as where the testator is possessed of the legal term, the act, which at law would amount to an ademption, must be equally so in equity to preserve uniformity of decision; but that where the subject is solely within the jurisdiction of a court of equity, as where the testator is merely *cestui que trust*, and the equitable interest alone is bequeathed, the Court will not permit a mere surrender of the old lease by the testator and his trustee to defeat the specific legatees, but will consider the intention appearing upon the will; and although there may be no expressions sufficient at law to pass the renewed lease, yet it will attach the trusts of the old to the new lease, when it is apparent that the testator, by the surrender, did not intend to disappoint the provisions he had made by his will.

Accordingly, in *Carte* v. *Carte*,(*o*) *A.* being prebendary of *Tachbrooke*, granted, in the year 1714, a lease of his prebendal lands to one of his children, for twenty-one years, who declared the *trust* for *A.* for so many years of the term as he should live, and then for such persons as he should appoint by deed or will, and in default of appointment, among all his children equally. The lease was annually renewed, and similar declarations of trust were executed by the trustee. In 1735, *A.* made his will, and bequeathed to *B.*, his eldest son, his residuary estate, whether real or personal; and by a supplemental clause he declared that *B.* "should have the disposal of the lease of his prebend of *Tachbrooke*, made to his daughter *C.*, and that *B.* should receive to himself all the profits and *advantages* arising and accruing from it." In 1739, the last new lease was granted to *C.*; but it appeared from a clause inserted in the space between the conclusion and signature of the will, after the granting of the last lease, that the will was republished; and although the cause was decided upon that point, Lord *Hardwicke* determining that the renewed lease passed to *B.* by the republication, yet his Lordship was of opinion, that if the will had not been republished, the renewal of the lease would not have been an ademption; the subject devised being a *trust*, and the intention clear, that no ademption was meant by the testator,(*p*) the devise extending to the whole *trust*: and the word "advantages," his Lordship observed, was sufficient to include all the advantages and benefits belonging to the trust, and consequently, all renewals.

That Sir *William Grant*, M. R. considered the decision of the last case to have been made in consequence of the devise being of a *trust* and not of a *legal* term, appears from his criticism in the case of *Slatter* v. *Noton*;(*q*) in which he said, "I think it will be found that the case of *Carte* v. *Carte*, is the only one in which the renewed lease was held to pass without any words directly applicable to a future interest; and that case is very distinguishable from the present.

(*n*) Case last referred to, p. 179.
(*p*) 3 Atk. 176–179.
(*o*) 3 Atk. 174. Ambl. 28. *S. C.*
(*q*) 16 Ves. 201, stated *supra*, p. 252.

Lord *Hardwicke* lays considerable stress upon the nature of the subject of disposition; the *trust* of a term, *not* a *legal* interest; and says, that distinguishes it from the decided cases. Next, the words in the will were conceived to be sufficient to take in all the advantages and benefits belonging to the trust, one of which was that of the renewal; and the devisee could hardly be said to have all the advantages arising and accruing from the former lease, unless he had the advantage of substituting the renewed lease in its place."

It appears, from the cases before stated, upon devises of *legal* interests for years, of which the testators were possessed; that the ground upon which the Court of Chancery decided that renewed interests in the property did not pass under the prior wills, was from the terms of the bequests being insufficient to include them. And it further appears, that although the words of bequest be sufficient in their import to pass the renewed interests, so as to prevent an ademption in consequence of the surrenders of the old leases, yet the words will not be allowed that effect if they be confined to interests which testators had at the dates of their wills. If, however, the expressions have a prospective or future operation, the specific devisee will not be disappointed of his legacy by a testator surrendering the old and taking a new lease, since he will be entitled to the latter under the terms of the bequest. If, then, the devise were of "all the estate, right and interest which the testator has or shall have to come in lands held by him under a lease from *A.* at the time of his death," and the testator renewed the lease, it is presumed that the specific devisee would be entitled to it.(*r*)

So also if the old lease contained a covenant on the part of the lessor to renew, and the lessee devised "all his right and interest under or *by virtue* of the lease" to *B.*, it seems but reasonable that a new lease taken by the testator after making his will should pass to *B.*, since the terms of the bequest, and the testator's title under the old lease, show that he intended to pass whatever interest he had or *should have* in consequence of that lease at his death; and a renewed lease is an interest of the latter description.(*s*)

When the devise is not of a specific term or lease, or of the interest which the testator had at the date of his will, but leasehold property is bequeathed as part of his general estate, a renewal of the lease by the testator will not be an ademption of the devise; for such a disposition is not specific, but general, passing *all* the goods and chattels which the testator should be possessed of at his death; and the mention of the leasehold estate is no more than a specification of one of the particulars of which the general estate consisted; so that as the purchase of leasehold property after the will is made would be included in the terms of the bequest, it follows that a subsequent renewal by the testator of an old lease will equally pass to the legatee. In illustration of this:

A. devised "*all* and *singular* his *leasehold estate*, goods, chattels, and personal estate whatsoever, to his daughter *B.*;" and in the residuary clause he repeated the words "all and singular." *A.* afterwards renewed a lease with the dean and chapter of *Windsor;* and it was a question, whether the renewal of the lease was an ademption?

(*r*) *Vide* Lord *Eldon's* opinion *James* v. *Dean*, 11 Ves. 389. (*r*) See last reference.

And Lord *Hardwicke* determined in the negative, for the reasons before mentioned.(*t*)

SECONDLY, as to *leases for lives.*

The renewal of leases for lives will always create an ademption, when such renewal is made after the date of the will, because by the surrender of the old leases there is nothing upon which the devise can operate. It cannot pass the old estates because that was determined by the surrender, and it cannot transfer the new estate acquired by the renewal, since that being *freehold*, it is a rule that no freehold interest can pass by a will, but such which a testator was seised of, or entitled to, when he made that instrument.(*u*)

SECT. II. ABATEMENT of Specific Legacies.

Having in the preceding section treated of those acts of a testator which will operate as ademptions of specific legacies, it is intended to consider, in the present section, the circumstances under which specific legatees will be under the necessity of parting with the whole, or portions of their legacies, although the subjects devised to them remained and were not adeemed at the testator's death. This obligation upon specific legatees is technically known by the term "*abatement.*"

1. It is a rule, as noticed in the beginning of the third chapter,(*x*) that specific legatees can only be called upon by the executor for abatement, upon failure of the general personal estate to discharge debts. These legacies, therefore, must be fully satisfied to the prejudice of general legatees. But when the personal assets, not specifically bequeathed, are deficient to pay all the debts, then the specific legatees must abate or contribute in proportion to the value of their individual legacies.(*y*) The principal is the presumed intention of the testator, (presumed from his severing specific parts of his personal estate from the rest, and bequeathing them specifically,) to give a preference to those legatees.

The rule of abatement, as before stated, is clearly settled. The principal difficulty is to ascertain when the legacies are specific, a subject discussed in the third chapter, and from which it will appear what legacies are and what are not specific.

After the preceding observations, we shall proceed to consider instances of abatement, that are likely to occur in practice, and require particular consideration.

2. Cases may arise of stock, or of the proceeds of an estate directed to be sold, being specifically given in fractional parts, and testators may have miscalculated the amount of the stock, and may have been mistaken in the probable proceeds to arise from the estate to be sold, so that the stock and such proceeds are insufficient to answer the whole of the portions of them given or intended for the several legatees; or it may be necessary to resort to those funds, so parcelled out, for contribution upon a deficiency of assets

(*t*) *Stirling* v. *Lydiard*, 3 Atk. 199. *Digby* v. *Legard*, Dick. Rep. 500–503.

(*u*) See 1 P. Will. 575. *Marwood* v. *Turner*, 3 P. Will. 170. *Abney* v. *Miller*, 2 Atk. 597. *Digby* v. *Legad*, Dick. Rep. 500. Cited 1 Bro. C. C. 501. 3 P. Will. note p. 22.

(*x*) *Supra*, p. 150.

(*y*) *Sleech* v. *Thorington*, 2 Ves. sen. 561-564. *Clifton* v. *Burt*, 1 P. Will. 680. Duke of *Devon* v. *Atkins*, 2 P. Will. 383.

to pay debts, and in consequence the application of the general rule in regard to abatement may be attended with uncertainty. In all those cases the intention of the testator, to be collected from his will, is the guide; and it would seem, from the authorities after referred to, that, in general, if the person to whom the last fractional part of the stock or proceeds is given, be appointed to take it as the *residue* or *remainder* of the specific fund, whatever may be its amount, then he, as residuary legatee, will only be entitled to the surplus of the fund, after full satisfaction of the other aliquot parts of it specifically bequeathed; so that such person in the character of *residuary* legatee can show no right to call upon the *particular* legatees of fractional parts of the stock or proceeds to abate, for since, if there had been an excess of the funds, he, as residuary legatee, would have been entitled to it; so, if there be a deficiency, it is only equitable that his share should be *minus* in that proportion. Upon this principle Lord *Thurlow* determined in the case of *Danvers* v. *Manning*,(*z*) before stated.(*a*)

But although the last aliquot share of the fund be given by the word "remainder" or "residue," yet if, from the context of the will, it appear to have been the testator's intention that all the specific legatees should have certain defined parts or proportions of the subject, by whatever words they were bequeathed, then the last named legatee, although in terms a residuary legatee, will be entitled to call upon the other legatees of parts of the fund to abate equally with him upon their respective shares. An instance of this occurred in *Page* v. *Leapingwell*,(*b*) stated in the third chapter.(*c*)

3. It has been observed, that the testator's intention is the principle upon which a court of equity acts in arrangements of abatement; in conformity with which, if the testator's freehold estate be subject to debts, a specific devisee of it will be obliged to contribute upon a deficiency of the general personal assets with the specific legatee of a chattel.

Accordingly, if a freehold estate be devised to *A.* and a leasehold to *B.* and the testator die indebted by bond to an amount more than sufficient to exhaust the personal fund, *B.* may compel *A.* to abate or contribute with him to the satisfaction of the debts. The reason is, that both estates are liable to those demands, and it was equally the testator's intention that *B.* should have the leasehold, as that *A.* should have the freehold estate. This was decided in the case of *Long* v. *Short*.(*d*) But the determination would be different if the debts were only by simple contract, and were not charged upon the real fund; for then the leasehold, as the sole remaining estate liable to those duties, must be wholly applied towards their liquidation.

From the preceding observations, the following remarks occur respecting estates *pour autre vie* of which a testator was seised at the time of his will, and of his death. If an estate limited to a testator and his *heirs* during the life of *A.* be devised by him to *B.* and a leasehold estate to *C.* and the general personal assets are in-

(*z*) 2 Bro. C. C. 19-22. 1 Cox, Rep. 203, *S. C.* and see 1 P. Will. 404.
(*a*) *Supra*, p. 228. (*b*) 18 Ves. 463. (*c*) *Supra*, p. 154.
(*d*) 1 P. Will. 403.

sufficient to pay all the debts by *specialty*, *B.* and *C.* must contribute in proportion to their legacies in supplying the deficiency; because both estates are liable to those debts, the freehold *pour autre vie* being placed in the same situation in that respect under the statute of fraudulent devises(*e*) as an estate of inheritance. But as estates *pour autre vie* so limited to the heirs are not liable to simple contract debts, *C.* could not call upon *B.* to abate in respect of them. If, however, the grant of the estate *pour autre vie* had been limited to the testator, his *executors*, &c. since that species of interest is made personal estate by the statute of frauds,(*f*) if specifically devised as before, *B.* would be liable to abate with *C.* in discharge of debts by simple contract, as well as those by specialty.(*g*)

It has been noticed that, in general, specific legatees are not compellable to abate in favour of general legatees; but to this rule, as to most others, there is an exception. For if the whole of a testator's personal property be disposed of specifically, and he bequeath general legacies, the latter must be paid out of the former.

Suppose, then, a person possessing personal estate at *B.* and *C.* only, to bequeath it to *D.* and *E.* and then to give a legacy to *F.* The personal estate at *B.* and *C.* will be liable to the payment of the legacy in proportion to their several amounts, because there never were any other funds out of which it could have been satisfied, and the usual presumption of preference intended by testators in favour of specific legatees is repelled in this instance.(*h*)

4. It is proper in conclusion, to refer to those legacies which are in one sense, specific, and in another, general. They have been described in a preceding chapter, as bequests of money, with reference to a particular fund for their payment, and not simply a gift of the specific fund itself.(*i*) Those legatees have such a lien upon the specific fund referred to, that they will not be obliged to abate with general legatees;(*k*) and in this, as in the preceding cases, the testator's intention is the principle; for it is inferred, that he, in referring to specific parts of his estate for payment of particular legacies, intended those legacies a preference to others which he had not so secured.

Thus, if *A.* bequeathed to *B.* 500*l.* *out* of a debt of 1000*l.* or *out* of his 2000*l.* three *per cent.* consols; *B.* will not be obliged to abate with the general legatees upon a deficiency of general assets to pay all debts and legacies. This was so settled in the cases below referred to(*l*), and before stated. But if the fund out of which the legacy is payable, happen, from any cause, to be insufficient fully to discharge it, and the personal estate fall short to answer the deficiency, and wholly to pay the other legacies, *B.* is so far a general legatee,

(*e*) 3 & 4 Will. & Mary, chap. 14. and see *Westfaling* v. *Westfaling*, 3 Atk. 460-465. (*f*) 29 Char. II. chap. 3. sect. 12.

(*g*) Duke of *Devon* v. *Atkins*, 2 P. Will. 381. and see *Atkinson* v. *Baker*, 4 Term Rep. 230. *Campbell* v. *Sandys*, 1 Scho. & Lefroy, 281-289, &c. and *Ripley* v. *Waterworth*, 7 Ves. 425. 441, &c.

(*h*) By the Chancellor in *Sayer* v. *Sayer*, Pre. Ch. 393.

(*i*) See the beginning of chap. 3. p. 150, and pp. 168. 181.

(*k*) *Acton* v. *Acton*, 1 Meriv. 178, stated *supra*, p. 183. *Smallbone* v. *Brace*, Finch. 303.

(*l*) *Roberts* v. *Pocock*, 4 Ves. 150--160, *ante*, p. 181. and *Lambert* v. *Lambert*, 11 Ves. 607, *supra*. p. 171.

as that he may oblige those other legatees to abate and contribute with him their proportions of the deficiency in the fund. *B.* however, can be in no better condition than a specific legatee, so that if the other general assets be insufficient to pay all the debts, he must abate with other specific legatees, and in this respect he is to be considered a specific legatee, and entitled to call for such contribution.(*m*)

CHAPTER VI.

Of General Legacies, and their Ademption, and of Parol Evidence in certain cases on that subject.

Sect. I. Of the ademption of legacies given as *portions* to children by their father.

1.—*When the children are legitimate.*
2.—*Exceptions to the presumption of ademption in cases under the last article.*

Sect. II. Of the ademption of Legacies by subsequent advancements when the legatees are considered *strangers* to the testator, and the legacies *not portions.*

1.—*When the legacies are mere* bounties; *and of bequests to* natural *children by their putative father.*
2.—*When a testator has placed himself* in loco parentis.
3 and 4.—*Of the admissibility of* parol evidence *on the last subject; as also to prove an intention to adeem when the testator is, or is considered to be, a* stranger *to the legatee.*
5.—*Of the* sufficiency *and* insufficiency *of such evidence when admissible.*
6.—*And the different degrees of importance attached to parol evidence in detailing* declarations *of testators, in regard to the* times when *and* to whom they *were made.*

A legacy is general when it is so given as not to amount to a bequest of a *specific* part of a testator's personal estate; as of a sum of money generally, or *out* of the testator's personal estate, and the like.(*a*)

In the beginning of the last chapter it was attempted to explain the distinction of ademption as applicable to a specific or to a general legacy not given as a portion. It was considered that an intention to adeem by a testator's receipt of the subject *specifically* given was immaterial, since the legacy must be necessarily defeated, whatever the testator's meaning or purpose might have been, because the thing was extinct, and nothing remained at his death to which the testamentary description could apply. But that with respect to general legacies, not given as portions, which are payable out of the

(*m*) 4 Ves. 160. (*a*) See chap. II. *passim*, and particularly pp. 49. 50. 60. 74.

general personal estate, intention is of the very essence of ademption; since, whether an advancement by a testator during his life should or should not be a satisfaction, or in substitution of what he had bequeathed to the person so advanced, is a question of fact, which can only be resolved by reference to the intention of the donor.(*b*)

In treating upon the subjects of the present chapter we shall begin,

SECT. I. With the ademptions of *portions* given by will.

1. It is now the settled doctrine of a Court of Equity, that where a father gives a legacy to a legitimate child, without stating the purpose for which it was given, he is to be *presumed* as having intended it as a *portion*, whether he call it so or not; and that if he afterwards advance a portion upon the child's marriage, it is a satisfaction of the legacy, the advancement and the legacy being for the same purpose. And it will be a *complete* ademption of the legacy, although the sum advanced be not equal to, but *less* than the testamentary portion; and for this reason, that the father, owing his child a debt of nature, is sole judge of the amount of the provision by which he intends to satisfy it; and although at the date of his will he conceived that he could not discharge his moral obligation with less than, suppose 10,000*l.*; yet, that by a change of circumstances, and of his sentiments upon the extent of that obligation, he thought that it might be satisfied by an *advance* of a portion of 5000*l.*(*c*) In ex parte *Dubost*,(*d*) Lord *Eldon* seems to consider the doctrine of the Court to be this: that where a father gives a legacy to a child it must be understood as a *portion*, although not so described, because it is a provision by a parent for his child. And that the father afterwards *advancing* a portion for that child, will by that act adeem the legacy, although there may be *slight* circumstances of difference between the advancement and the portion, and a *difference in amount*.(*e*)

We shall next proceed to adduce authorities in support of the above observations.

FIRST, Of the advancement by a parent to his child being *primâ facie* an ademption of a legacy given to it by his will.

In *Elkenhead's* case,(*f*) a father bequeathed 1000*l.* a piece to his five daughters. He afterwards advanced, upon the marriage of one of them 1000*l.*, and it was determined that her legacy or portion was adeemed.

So also in *Ward* v. *Lant*,(*g*) *A.* bequeathed 5000*l.* a piece to his four daughters as their portions, to be raised out of his real estates; and he afterwards advanced to one of them upon marriage 4000*l.*; which was decided to be an ademption of the legacy.

The Master of the Rolls held the same doctrine in *Scotton* v. *Scotton*,(*h*) and in *Tapper* v. *Chalcroft*,(*i*) a case before Lord *Hardwicke* in the year 1739, his Lordship determined, that a legacy given to a daughter by her father was adeemed by his subsequent advancement of a marriage portion. Again,

In *Watson* v. Lord *Lincoln*,(*k*) Mr. *Pelham* having four daughters, appointed by will under a power in his marriage settlement

(*b*) Chap. V. pp. 238. 253. 254. (*c*) 18 Ves. 151. (*d*) Ibid. 153.
(*e*) See 2 Atk. 518. and 17 Ves. 191. 2 Cox's Ca. 220.
(*f*) Cited 2 Vern. 257. and see *Farnham* v. *Phillips*, 2 Atk. 215.
(*g*) Pre. Ch. 182. (*h*) 1 Stra. 236. (*i*) Cited 2 Atk. 492. (*k*) Ambl. 325.

10,000*l.* among them, with the exception of Lady *Lincoln*, whom he had advanced. And he bequeathed his personal estate amongst his daughters, again excluding Lady *Lincoln*. After this, *Grace*, one of the daughters, married Mr. *Watson*; on which occasion her father advanced to her 20,000*l.* by applying part of the 10,000*l.* and otherwise. One of the questions was, whether that advancement was an ademption of the legacy? And Lord *Hardwicke* decided in the affirmative, upon two grounds; first, because both provisions being for the same purpose, *viz.* a portion, a court of equity inclined against *double* portions: and secondly, because the advancement was a performance of the father's moral obligation to provide for his child, which he once intended to do by his will.

And in *Grave* v. *Salisbury*,(*l*) Lord *Thurlow* admits the doctrine to be settled as before stated, although he regrets it. His expressions are, "the Court has certainly presumed against *double* portions; and although it has encouraged that conjecture with a degree of sharpness to which I cannot reconcile myself, yet wherever a provision is made *directly*, or as a portion by a parent or person *in loco parentis*, I will not displace the rule laid down by wiser men, *viz.* that it shall be a satisfaction, however reluctant I may be to follow it."

The case of *Upton* v. *Prince*(*m*) may here be introduced, which is in fact a case of ademption, though one in which the testamentary provision was made *subsequently* to the advancement, which at the making of the will the testator had forgotten or mistaken: the receipt of the sum advanced expressly acknowledged the advancement to be in part of any testamentary provision there had been, or which should thereafter be made by the father.

In that case, *William Prince* had issue two sons, *William* and *Peter*, and four daughters, and, in his lifetime, advanced each of them 1500*l.* and took from them each a receipt in the following words: "Received of my father, *William Prince*, the sum of 1500*l.* which I do hereby acknowledge to be on account and in part of what he has given, or shall in or by his last will give unto me his son." Some time after, *William Prince* made his will, which contained the following words: "And whereas, I have heretofore paid to, given or advanced with my children, *William*, *Elizabeth*, and *Sarah*, the sum of 1500*l.* a piece; now, I do hereby in like manner, give and bequeath unto my three other children, *Peter*, *Mary*, and *Anne*, the several sums of 1500*l.* a piece;" and he then gave the residue equally amongst his children. *William Prince*, the father, died without revoking his will, and it was insisted by *Peter*, that the receipt given to his father could not control the express gift of the father *subsequent*; and the father's omitting *Peter* in the mention of advancement showed he plainly intended a difference between them; the receipts given by both, and the case of both being the same. But the Lord Chancellor decreed the 1500*l.* received by *Peter* in his father's lifetime, to be a satisfaction for what the father gave him by his will; and that he should not have another 1500*l.* upon the latter words.

(*l*) 1 Bro. C. C. 427. and *Jenkins* v. *Powell*, 2 Vern. 115.
(*m*) Cas. Tem. Tab. 71. 3d edit.

The before mentioned cases and opinions sufficiently prove the accuracy of Lord *Eldon's* first proposition in *ex parte Dubost, viz.* that where a father gives a legacy to a child, it is to be understood as a portion, although it be not so expressed; and that a subsequent advancement by him will be an ademption of the bequest. The authorities which have been produced were of advancements larger than, or equal to, the testamentary portions, but the cases next adduced will prove,—

SECONDLY, his Lordship's remaining proposition, that slight circumstances of difference between the advancement and the portion will not repel the presumed intention.

Suppose then the advancement to be of inferior amount to the portion given by will; it has been decided, for the reasons before stated,(*n*) that the former will be a complete ademption of the latter.

In *Hartop* v. *Whitmore*,(*o*) *A.* bequeathed to his daughter a portion of 300*l.* and then gave her upon marriage a portion of 200*l.* He lived four years afterwards without having revoked his will, and Lord *Parker*, C. determined that the advancement was a *total* ademption of the testamentary portion. And with respect to the objection which was taken, that if *A.* had meant by the advancement to adeem the legacy, he would not have lived four years after that transaction without revoking the bequest, his Lordship answered, there was no necessity for *A.* to make such revocation, since he had effectually done so by the advancement.

So also in *Clarke* v. *Burgoine*,(*p*) *B.* gave to his daughter two legacies amounting to 7000*l.* He afterwards, upon the marriage of the legatee, paid 2000*l.* in part of a portion, and covenanted to pay 4000*l.* more at his death. It was declared by Lord *Camden*, C., that *B.* having advanced a portion of 6000*l.* on the marriage of his daughter, *viz.* 2000*l. in præsenti*, and 4000*l.* at his decease, the two legacies of 7000*l.* were adeemed.

Instances in which the advancement of a less sum may only be a partial ademption of a testamentary portion, are where a testator has declared his intention, either by writing or verbally, that the advance shall be restricted to that purpose.

This occurred in *Hoskins* v. *Hoskins*,(*q*) in which case it was proved that the father in paying 650*l.* for the purchase of a cornet of horse for his son, intended that the sum should be deducted out of 750*l.* which he had left him by will.

If a difference in amount between the advancement and the testamentary portion will not repel the presumed ademption by the former, it seems to follow that the slighter difference between them of the times of payment, when both are certain, will not have that effect.

Accordingly in *Hartopp* v. *Hartopp*,(*r*) *A.* bequeathed 3000*l.* for the portions of his younger son and daughter *B.* and *C.*, and such other children as he might have, in equal shares; to be vested interests in daughters at twenty-one, or on marriage, with the consent

(*n*) P. 257.
(*o*) 1 P. Will. 681. and see Mr. Cox's note for a further statement, though the principle of the decision is the same, and agrees with the report.
(*p*) 1 Dick. 353.
(*q*) Pre. Ch. 263. and see *Thellusson* v. *Woodford*, 4 Madd. 420. *S. P.*
(*r*) 17 Ves. 184.

to pay debts, and in consequence the application of the general rule in regard to abatement may be attended with uncertainty. In all those cases the intention of the testator, to be collected from his will, is the guide; and it would seem, from the authorities after referred to, that, in general, if the person to whom the last fractional part of the stock or proceeds is given, be appointed to take it as the *residue* or *remainder* of the specific fund, whatever may be its amount, then he, as residuary legatee, will only be entitled to the surplus of the fund, after full satisfaction of the other aliquot parts of it specifically bequeathed; so that such person in the character of *residuary* legatee can show no right to call upon the *particular* legatees of fractional parts of the stock or proceeds to abate, for since, if there had been an excess of the funds, he, as residuary legatee, would have been entitled to it; so, if there be a deficiency, it is only equitable that his share should be *minus* in that proportion. Upon this principle Lord *Thurlow* determined in the case of *Danvers* v. *Manning*,(*z*) before stated.(*a*)

But although the last aliquot share of the fund be given by the word "remainder" or "residue," yet if, from the context of the will, it appear to have been the testator's intention that all the specific legatees should have certain defined parts or proportions of the subject, by whatever words they were bequeathed, then the last named legatee, although in terms a residuary legatee, will be entitled to call upon the other legatees of parts of the fund to abate equally with him upon their respective shares. An instance of this occurred in *Page* v. *Leapingwell*,(*b*) stated in the third chapter.(*c*)

3. It has been observed, that the testator's intention is the principle upon which a court of equity acts in arrangements of abatement; in conformity with which, if the testator's freehold estate be subject to debts, a specific devisee of it will be obliged to contribute upon a deficiency of the general personal assets with the specific legatee of a chattel.

Accordingly, if a freehold estate be devised to *A.* and a leasehold to *B.* and the testator die indebted by bond to an amount more than sufficient to exhaust the personal fund, *B.* may compel *A.* to abate or contribute with him to the satisfaction of the debts. The reason is, that both estates are liable to those demands, and it was equally the testator's intention that *B.* should have the leasehold, as that *A.* should have the freehold estate. This was decided in the case of *Long* v. *Short*.(*d*) But the determination would be different if the debts were only by simple contract, and were not charged upon the real fund; for then the leasehold, as the sole remaining estate liable to those duties, must be wholly applied towards their liquidation.

From the preceding observations, the following remarks occur respecting estates *pour autre vie* of which a testator was seised at the time of his will, and of his death. If an estate limited to a testator and his *heirs* during the life of *A.* be devised by him to *B.* and a leasehold estate to *C.* and the general personal assets are in-

(*z*) 2 Bro. C. C. 19-22. 1 Cox, Rep. 203, *S. C.* and see 1 P. Will. 404.
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sufficient to pay all the debts by *specialty*, *B.* and *C.* must contribute in proportion to their legacies in supplying the deficiency; because both estates are liable to those debts, the freehold *pour autre vie* being placed in the same situation in that respect under the statute of fraudulent devises(*e*) as an estate of inheritance. But as estates *pour autre vie* so limited to the heirs are not liable to simple contract debts, *C.* could not call upon *B.* to abate in respect of them. If, however, the grant of the estate *pour autre vie* had been limited to the testator, his *executors*, &c. since that species of interest is made personal estate by the statute of frauds,(*f*) if specifically devised as before, *B.* would be liable to abate with *C.* in discharge of debts by simple contract, as well as those by specialty.(*g*)

It has been noticed that, in general, specific legatees are not compellable to abate in favour of general legatees; but to this rule, as to most others, there is an exception. For if the whole of a testator's personal property be disposed of specifically, and he bequeath general legacies, the latter must be paid out of the former.

Suppose, then, a person possessing personal estate at *B.* and *C.* only, to bequeath it to *D.* and *E.* and then to give a legacy to *F.* The personal estate at *B.* and *C.* will be liable to the payment of the legacy in proportion to their several amounts, because there never were any other funds out of which it could have been satisfied, and the usual presumption of preference intended by testators in favour of specific legatees is repelled in this instance.(*h*)

4. It is proper in conclusion, to refer to those legacies which are in one sense, specific, and in another, general. They have been described in a preceding chapter, as bequests of money, with reference to a particular fund for their payment, and not simply a gift of the specific fund itself.(*i*) Those legatees have such a lien upon the specific fund referred to, that they will not be obliged to abate with general legatees;(*k*) and in this, as in the preceding cases, the testator's intention is the principle; for it is inferred, that he, in referring to specific parts of his estate for payment of particular legacies, intended those legacies a preference to others which he had not so secured.

Thus, if *A.* bequeathed to *B.* 500*l.* *out* of a debt of 1000*l.* or *out* of his 2000*l.* three *per cent.* consols; *B.* will not be obliged to abate with the general legatees upon a deficiency of general assets to pay all debts and legacies. This was so settled in the cases below referred to(*l*), and before stated. But if the fund out of which the legacy is payable, happen, from any cause, to be insufficient fully to discharge it, and the personal estate fall short to answer the deficiency, and wholly to pay the other legacies, *B.* is so far a general legatee,

(*e*) 3 & 4 Will. & Mary, chap. 14. and see *Westfaling* v. *Westfaling*, 3 Atk. 460-465. (*f*) 29 Char. II. chap. 3. sect. 12.

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(*i*) See the beginning of chap. 3. p. 150, and pp. 168. 181.

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as that he may oblige those other legatees to abate and contribute with him their proportions of the deficiency in the fund. *B.* however, can be in no better condition than a specific legatee, so that if the other general assets be insufficient to pay all the debts, he must abate with other specific legatees, and in this respect he is to be considered a specific legatee, and entitled to call for such contribution.(*m*)

CHAPTER VI.

Of General Legacies, and their Ademption, and of Parol Evidence in certain cases on that subject.

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In the beginning of the last chapter it was attempted to explain the distinction of ademption as applicable to a specific or to a general legacy not given as a portion. It was considered that an intention to adeem by a testator's receipt of the subject *specifically* given was immaterial, since the legacy must be necessarily defeated, whatever the testator's meaning or purpose might have been, because the thing was extinct, and nothing remained at his death to which the testamentary description could apply. But that with respect to general legacies, not given as portions, which are payable out of the

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general personal estate, intention is of the very essence of ademption; since, whether an advancement by a testator during his life should or should not be a satisfaction, or in substitution of what he had bequeathed to the person so advanced, is a question of fact, which can only be resolved by reference to the intention of the donor.(*b*)

In treating upon the subjects of the present chapter we shall begin,

SECT. I. With the ademptions of *portions* given by will.

1. It is now the settled doctrine of a Court of Equity, that where a father gives a legacy to a legitimate child, without stating the purpose for which it was given, he is to be *presumed* as having intended it as a *portion*, whether he call it so or not; and that if he afterwards advance a portion upon the child's marriage, it is a satisfaction of the legacy, the advancement and the legacy being for the same purpose. And it will be a *complete* ademption of the legacy, although the sum advanced be not equal to, but *less* than the testamentary portion; and for this reason, that the father, owing his child a debt of nature, is sole judge of the amount of the provision by which he intends to satisfy it; and although at the date of his will he conceived that he could not discharge his moral obligation with less than, suppose 10,000*l.*; yet, that by a change of circumstances, and of his sentiments upon the extent of that obligation, he thought that it might be satisfied by an *advance* of a portion of 5000*l.*(*c*) In ex parte *Dubost*,(*d*) Lord *Eldon* seems to consider the doctrine of the Court to be this: that where a father gives a legacy to a child it must be understood as a *portion*, although not so described, because it is a provision by a parent for his child. And that the father afterwards *advancing* a portion for that child, will by that act adeem the legacy, although there may be *slight* circumstances of difference between the advancement and the portion, and a *difference in amount*.(*e*)

We shall next proceed to adduce authorities in support of the above observations.

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In *Elkenhead's* case,(*f*) a father bequeathed 1000*l.* a piece to his five daughters. He afterwards advanced, upon the marriage of one of them 1000*l.*, and it was determined that her legacy or portion was adeemed.

So also in *Ward* v. *Lant*,(*g*) *A.* bequeathed 5000*l.* a piece to his four daughters as their portions, to be raised out of his real estates; and he afterwards advanced to one of them upon marriage 4000*l.*; which was decided to be an ademption of the legacy.

The Master of the Rolls held the same doctrine in *Scotton* v. *Scotton*,(*h*) and in *Tapper* v. *Chalcroft*,(*i*) a case before Lord *Hardwicke* in the year 1739, his Lordship determined, that a legacy given to a daughter by her father was adeemed by his subsequent advancement of a marriage portion. Again,

In *Watson* v. Lord *Lincoln*,(*k*) Mr. *Pelham* having four daughters, appointed by will under a power in his marriage settlement

(*b*) Chap. V. pp. 238. 253. 254. (*c*) 18 Ves. 151. (*d*) Ibid. 153.
(*e*) See 2 Atk. 518. and 17 Ves. 191. 2 Cox's Ca. 220.
(*f*) Cited 2 Vern. 257. and see *Farnham* v. *Phillips*, 2 Atk. 215.
(*g*) Pre. Ch. 182. (*h*) 1 Stra. 236. (*i*) Cited 2 Atk. 492. (*k*) Ambl. 325.

10,000*l.* among them, with the exception of Lady *Lincoln*, whom he had advanced. And he bequeathed his personal estate amongst his daughters, again excluding Lady *Lincoln*. After this, *Grace*, one of the daughters, married Mr. *Watson;* on which occasion her father advanced to her 20,000*l.* by applying part of the 10,000*l.* and otherwise. One of the questions was, whether that advancement was an ademption of the legacy? And Lord *Hardwicke* decided in the affirmative, upon two grounds; first, because both provisions being for the same purpose, *viz.* a portion, a court of equity inclined against *double* portions: and secondly, because the advancement was a performance of the father's moral obligation to provide for his child, which he once intended to do by his will.

And in *Grave* v. *Salisbury*,(*l*) Lord *Thurlow* admits the doctrine to be settled as before stated, although he regrets it. His expressions are, "the Court has certainly presumed against *double* portions; and although it has encouraged that conjecture with a degree of sharpness to which I cannot reconcile myself, yet wherever a provision is made *directly*, or as a portion by a parent or person *in loco parentis*, I will not displace the rule laid down by wiser men, *viz.* that it shall be a satisfaction, however reluctant I may be to follow it."

The case of *Upton* v. *Prince*(*m*) may here be introduced, which is in fact a case of ademption, though one in which the testamentary provision was made *subsequently* to the advancement, which at the making of the will the testator had forgotten or mistaken: the receipt of the sum advanced expressly acknowledged the advancement to be in part of any testamentary provision there had been, or which should thereafter be made by the father.

In that case, *William Prince* had issue two sons, *William* and *Peter*, and four daughters, and, in his lifetime, advanced each of them 1500*l.* and took from them each a receipt in the following words: "Received of my father, *William Prince*, the sum of 1500*l.* which I do hereby acknowledge to be on account and in part of what he has given, or shall in or by his last will give unto me his son." Some time after, *William Prince* made his will, which contained the following words: "And whereas, I have heretofore paid to, given or advanced with my children, *William*, *Elizabeth*, and *Sarah*, the sum of 1500*l.* a piece; now, I do hereby in like manner, give and bequeath unto my three other children, *Peter*, *Mary*, and *Anne*, the several sums of 1500*l.* a piece;" and he then gave the residue equally amongst his children. *William Prince*, the father, died without revoking his will, and it was insisted by *Peter*, that the receipt given to his father could not control the express gift of the father *subsequent;* and the father's omitting *Peter* in the mention of advancement showed he plainly intended a difference between them; the receipts given by both, and the case of both being the same. But the Lord Chancellor decreed the 1500*l.* received by *Peter* in his father's lifetime, to be a satisfaction for what the father gave him by his will; and that he should not have another 1500*l.* upon the latter words.

(*l*) 1 Bro. C. C. 427. and *Jenkins* v. *Powell*, 2 Vern. 115.
(*m*) Cas. Tem. Tab. 71. 3d edit.

The before mentioned cases and opinions sufficiently prove the accuracy of Lord *Eldon's* first proposition in *ex parte Dubost*, *viz.* that where a father gives a legacy to a child, it is to be understood as a portion, although it be not so expressed; and that a subsequent advancement by him will be an ademption of the bequest. The authorities which have been produced were of advancements larger than, or equal to, the testamentary portions, but the cases next adduced will prove,—

SECONDLY, his Lordship's remaining proposition, that slight circumstances of difference between the advancement and the portion will not repel the presumed intention.

Suppose then the advancement to be of inferior amount to the portion given by will; it has been decided, for the reasons before stated,(*n*) that the former will be a complete ademption of the latter.

In *Hartop* v. *Whitmore*,(*o*) *A.* bequeathed to his daughter a portion of 300*l.* and then gave her upon marriage a portion of 200*l.* He lived four years afterwards without having revoked his will, and Lord *Parker*, C. determined that the advancement was a *total* ademption of the testamentary portion. And with respect to the objection which was taken, that if *A.* had meant by the advancement to adeem the legacy, he would not have lived four years after that transaction without revoking the bequest, his Lordship answered, there was no necessity for *A.* to make such revocation, since he had effectually done so by the advancement.

So also in *Clarke* v. *Burgoine*,(*p*) *B.* gave to his daughter two legacies amounting to 7000*l.* He afterwards, upon the marriage of the legatee, paid 2000*l.* in part of a portion, and covenanted to pay 4000*l.* more at his death. It was declared by Lord *Camden*, C., that *B.* having advanced a portion of 6000*l.* on the marriage of his daughter, *viz.* 2000*l.* *in præsenti*, and 4000*l.* at his decease, the two legacies of 7000*l.* were adeemed.

Instances in which the advancement of a less sum may only be a partial ademption of a testamentary portion, are where a testator has declared his intention, either by writing or verbally, that the advance shall be restricted to that purpose.

This occurred in *Hoskins* v. *Hoskins*,(*q*) in which case it was proved that the father in paying 650*l.* for the purchase of a cornet of horse for his son, intended that the sum should be deducted out of 750*l.* which he had left him by will.

If a difference in amount between the advancement and the testamentary portion will not repel the presumed ademption by the former, it seems to follow that the slighter difference between them of the times of payment, when both are certain, will not have that effect.

Accordingly in *Hartopp* v. *Hartopp*,(*r*) *A.* bequeathed 3000*l.* for the portions of his younger son and daughter *B.* and *C.*, and such other children as he might have, in equal shares; to be vested interests in daughters at twenty-one, or on marriage, with the consent

(*n*) P. 257.
(*o*) 1 P. Will. 681. and see Mr. Cox's note for a further statement, though the principle of the decision is the same, and agrees with the report.
(*p*) 1 Dick. 353.
(*q*) Pre. Ch. 263. and see *Thellusson* v. *Woodford*, 4 Madd. 420. *S. P.*
(*r*) 17 Ves. 184.

of their guardian, or at twenty-one if they married without such consent, and in sons at twenty-one, with benefit of survivorship, amongst them, in the event of the deaths of any before they acquired vested interests. *A.* declared that if his son *B.* succeeded to *A.'s* real estate before he attained twenty-one, by the death of his elder brother *D.*, his share of the 3000*l.* should go to the other younger children, and that so it should be in the event of any other younger son succeeding to the estate before twenty-one. *A.* then directed that the portions should carry legal *interest from his death*, with a power to his executors to apply part of it for each child's maintenance and education; declaring that the surplus should accumulate, be invested, and added to the capital of each portion. The executors, too, were authorized to advance any part of the capital of a son's share for his advancement in life. And in order to make the fortunes of *B.* and *C.* equal (which was not the case for the reason stated by *A.*,) he gave to *B.* the further sum of 500*l.* with legal interest from his death, in the same manner as he had expressed in the disposition of the 3000*l.* and interest. *A.* also charged his personal and part of his real estate with the payment of those two sums. *A.* was seised under his marriage settlement, of certain real estates for life, with remainder in tail to his eldest son *D.* And upon an arrangement that took place upon the marriage of *D.* after the will was made, a recovery of the estates was suffered by *A.* and *D.*; the uses of which were declared by settlement to enure as to part, to the use of trustees for 600 years, upon trust if *B.* survived *A.* to raise for him 3500*l.* to be a vested interest upon *A.'s* death, and paid within six calendar months afterwards, *without interest*. The question being whether *B.* should have double portions, or whether the legacy was adeemed by the settlement, *B.* having become the only person interested in the 3000*l.* given by the will, on the events which had happened, Sir *William Grant*, M. R. determined that the portion by the settlement, was an ademption of that provided by the will, and for the following reasons:

His Honour observed, that, in instances of double provisions by a father for a child, slight circumstances of difference were not to be regarded; and in applying that rule to the case before him, he made the following remarks: "That although neither provision was to take effect in possession till the father's death, yet the legacy was to vest in possession at the age of twenty-one, or upon the previous marriages of daughters with consent, *with interest* from the father's decease, whereas the provision by settlement was payable within six months after his death, *without interest*. That the direction as to maintenance and advancement out of the legacy during the time it was contingent, could have no application to the provision by the settlement, which was to be raised only in the event of *B.* surviving his father, and even in that case payable within six months after the death of the father, *without* interest. Upon the whole (said his Honour,) it is not clear, which is most advantageous for the objects of the provision; but the balance against the last, if any, is not such as, independently of other grounds, will warrant the Court to hold, that the one provision cannot be a satisfaction of the other."(*s*)

(*s*) On this subject see *Jesson* v. *Jesson*, 2 Vern. 255. *Thomas* v. *Kemeys*, ibid. 349. also 2 Atk. 493. 3 Atk. 98.

It was objected in the last case, that, as the provision by settlement was not the father's sole act, but was made with the concurrence of *D.* his eldest son, it was not a case in which the presumption against double portions could apply. To this Sir *W. Grant* answered, that the probability, independently of extrinsic evidence (which had been given,) was, that it was the father who bargained for the charge in favour of his younger son, a fact clearly shown by the evidence, which proved that he had made it a condition of his concurrence in the settlement; whence the father was in effect the sole author of both provisions; for he, by concurring in the settlement, (which he was not bound to do,) and giving up his life-interest in a part of the estate, and subjecting other part of it to an annuity, which might fall upon it during his life, became a purchaser of the second provision, which made the case the same as if it came directly out of his own estate. His Honour thus concluded: "Excluding, then, *all declaration* of actual intention (the admissibility of which he doubted,) the *presumptive* intention is a substitution of 3500*l.* provided by the father's means for the younger son, in the room of the very sum, given by the will."

Seeing, then, that courts of equity so much incline against double portions, when proceeding from a parent to his legitimate children, in discharge of his moral obligation to provide for them, as to hold that the first should be adeemed by the second, in disregard to slight differences between them; it is proposed to consider:

2. When the difference between the provisions are so large or important as to repel the artificial presumption of the latter being in substitution of the former, and to entitle the children to their testamentary portions, notwithstanding advancements made to them by their parents on marriage.

The artificial doctrine of the Court, before stated, in regard to presumptive ademption, has met with severe reproof from modern Judges, as tending to defeat the intention of parents. In establishing the practice upon this subject, the Court appears to have paid respect to the civil law. The reasons, however, assigned in support of the equitable doctrine are unsatisfactory, for when a father is disposing of his property by testament, he does so with a view to the period of his death; but when he disposes of it by present gift, he does so with regard to his life, so that he may with propriety be allowed to be more liberal in the one case than in the other, and to intend a farther bounty to the person advanced, when his, the donor's, life shall determine, unless he expresses the contrary.

One exception to presumptive ademption is where the testamentary portion, and subsequent advancement are *non ejusdem generis.*

A case of this kind occurred in *Holmes* v. *Holmes*,(*t*) where *A.* in the year 1771, bequeathed to his son 500*l.*, and 4000*l.* to his four unmarried daughters. In 1779 *A.* took his son into partnership; the stock was to be 3000*l.* to be advanced in equal proportions, and to the profits of which they were to be equally entitled. The

(*t*) 1 Bro. C. C. 555.

whole capital was brought in by *A.*, and it was understood by the family, and admitted by the other children, that *A.* meant to give his son half of the stock. There was also parol evidence of his declarations to that effect. The question was, whether the advancement of a moiety of the stock was an ademption of the legacy of 500*l.* And it was determined in the negative, as the two provisions were *non ejusdem generis.*

The result of the last case appears to be, that the Court considered *A.* as not meaning to anticipate the provision he had made for his son by will in *money*, by advancing him with half of the stock in trade, consisting of *jewelry;* since it would be presuming too much to infer that *A.* had the idea of a portion in his mind, when he advanced for his son articles of a different kind from the fortune he had provided for him by will.(*u*)

A second exception occurs when the subsequent advancement depends upon a *contingency*, and the testamentary portion is certain. Suppose, then, the portion given by will to be declared vested upon the testator's death, and the portion afterwards settled upon the legatee, to be made expectant upon some contingency after the death of the parent; the latter will not adeem the former; for it would be unreasonable to presume that the father intended to discharge his natural obligation to make a certain provision for his child at his decease, by an advancement which may possibly never take effect. Accordingly Lord *Hardwicke* observed in his judgment in *Spinks* v. *Robins*,(*x*) that "in the construction of double portions it had always been of weight that they were both certain."

A third exception arises in instances where a legacy or advancement is not merely given as a portion, but is expressed to be made in *lieu* of or *compensation* for an interest to which the child was entitled; and upon this principle, that it is not to be presumed that the parent intended by such a bequest or advancement to perform his moral obligation to his child, since such provision is not merely for its maintenance or fortune, but in *lieu* of a benefit to which it was entitled *aliunde*, so that the child, by accepting the legacy or advancement, stands in the situation of a purchaser, and not as a person claiming under its parent's bounty.

Thus in *Baugh* v. *Read*,(*y*) *A.* the daughter of *B.*, being entitled under her grandfather's will to a sixth part of 10,000*l.* and to a like share of 6000*l.* under her father's settlement; *B.* the father (amongst other things) bequeathed to *A.* 8114*l.* 1*s.* 11*d. bank stock* for life, remainder to her children and grandchildren; but if she died without leaving such issue, he gave the same to his other children equally. The will recited the father's marriage settlement, and declared that the provision made by it for *A.* and his other children were intended in satisfaction of those they were entitled to under his settlement. *A.* afterwards married *C.*, on which occasion *B.* transferred 5000*l.* in stock to *A.'s* husband absolutely, and it was stipulated in the settlement of *A.* and *B.* that they in consideration of the 5000*l.* would transfer to *B.* all *A.'s* interest in the 10,000*l.* under her grandfather's will when she became entitled to it, and which was accor-

(*u*) 1 Bro. C. C. 427. (*x*) 2 Atk. 493. and see *Crompton* v. *Sale* 2 P. Will. 553.
(*y*) 1 Ves. jun. 257.

dingly done. The question was, whether the marriage portion given with *A.*, by her father, the testator, *B.*, was an ademption of the legacy of 8114*l.* 1*s.* 11*d.* bequeathed to her by his will, and it was determined in the negative.

It is observable in the last case, that the advancement by *B.* upon the marriage of his daughter *A.* having been made not merely as a portion, but with a view to the surrender by *A.* and her husband of her interest under her grandfather's will, excluded the presumption that her father *B.* intended also that it should go in satisfaction of the legacy he had given her by his will; which construction was strengthened, if not wholly confirmed, by the consideration that the legacy could not be considered as a pure bounty or portion, since it was given as the purchase of *A.'s* interest under *B.'s* marriage settlement. Such appear to have been the grounds of the determination.

A fourth exception to the general rule of presumptive advancement appears to be when the bequest is of *uncertain* amount. It has therefore been determined more than once, that the devise of a *residue* or of *part* of a residue to a child is not adeemed by a subsequent advancement upon the legatee's marriage. Such seems to be the rule established by authorities, although Sir *W. Grant*, M. R., in *Bengough* v. *Walker*,(*z*) intimated an opinion, which, if correct, would subvert this rule; for he hinted that a residuary bequest *might* probably be considered a satisfaction of a portion. If then this be so, there is no reason why an advancement by the parent might not be an ademption of such a legacy. But all the cases decided upon this question, and not under special circumstances, appear to negative that opinion. In *Farnham* v. *Phillips*,(*a*) Lord *Hardwicke* observed, there was no case where the devise had been of a residue that was *uncertain*, and at the testator's death might be more or less, in which the gift of a subsequent portion had been held an ademption. So in *Watson* v. The Earl of *Lincoln*,(*b*) his Lordship said, "he was doubtful" (though the Court in *Smith* v. *Strong*,(*c*) considered that his opinion was certain) "whether an advancement to Mrs. *Watson* on her marriage, by her father, was a satisfaction of one-third part of his personal estate previously given to her by his will; for as it was bequeathed by way of *residue*, he could not mean it as a portion, since it was always changing, and might be something, or might be nothing." And in *Freemantle* v. *Bankes*,(*d*) Lord *Rosslyn* entertained the same ideas; observing, "that the fallacy of the argument in favour of the advancement being an ademption, was in considering the bequest of the residue as a gift of a portion. It never could be so considered. The idea of a portion was, *ex vi termini*, a definite sum." With respect to the cases,—

In *Farnham* v. *Phillips*,(*e*) a freeman of *London*, having a wife and six children, bequeathed to his wife her widow's chamber, and the third of his estate which she was entitled to by the custom; and to his six children one-third, to which they were entitled by the

(*z*) 15 Ves. 513. (*a*) 2 Atk. 216. (*b*) Ambl. 327. (*c*) 4 Bro. C. C. 494.
(*d*) 5 Ves. 85. see also *Devese* v. *Pontet*, 1 Cox's Ca. 188 and Pre. Ch. 240. *in notis S. C.* (*e*) 2 Atk. 215. and see 4 Bro. C. C. 493.

same custom; and as to the remaining third, of which he had the power of disposal, he directed a debt of 100*l.* to be paid out of it, and the *residue* to be equally divided among his wife and children. Upon a subsequent marriage of one of his daughters, the testator gave her 1000*l.* called in her marriage articles her portion, or provision. And the question being, whether the advancement adeemed the daughter's testamentary share of the residue, Lord *Hardwicke* determined in the negative.

A similar decision was made by Lord *Rosslyn*, in *Freemantle* v. *Bankes;*(*f*) a case in which *A.* gave his residuary estate to trustees, in trust (after payment of debts, funeral and testamentary expenses, and of a legacy he had given, and such legacies as he might give by a codicil) for his four daughters, and any after-born children, as mentioned in his will. One of the daughters afterwards married; upon which occasion *A.* agreed to give with her a portion, by the transfer of so much stock (which was accordingly transferred) as would produce her husband a net yearly income of 400*l.*; the capital stock and interest to be settled upon husband and *wife, and their children.* The question was, whether the advancement of this portion was an ademption of the daughter's share of her father's residuary estate under the will? And the Court determined it was not satisfied, upon the principle before stated.

There was, however, a circumstance in the last case of considerable importance, which was not attended to; *viz.* that the advancement only gave the legatee an interest for *life*, whereas by the will she was entitled to a proportion of the residue absolutely. But had not the decision been founded upon the bequest being residuary, it is conceived that the other difference between the two provisions would not have prevented an ademption according to the general doctrine of courts of equity before stated; the reasons for which will appear in considering what is presumed to be a—

Fifth exception to the usual presumption in the ademption of portions; *viz.* that if the legacy to a child be *absolute*, and the advancement be given to him only for *life*, and the *capital* to *other persons*, the latter will not be a satisfaction of the former; and upon this ground, that the father is not to be presumed to have intended, in making such a partial settlement on his child, to revoke the testamentary disposition he had previously made as a portion, since the advancement is of *interest* only, but the legacy of *capital;* so that the two provisions are *non ejusdem generis.* Besides, the contrary presumption would have the effect of leaving the issue of the child, if he had any, unprovided for; at least, for any thing received by its parent from its grandfather: and intention not to be imputed to a father in the discharge of his moral obligation, in making a provision for his child.(*g*) But these remarks are inapplicable to cases where, after the life-estate to the child, suppose a daughter, as in the case of *Freemantle* v. *Bankes*, last stated, the money advanced is settled upon her children; for it may be rationally presumed, that the parent, in making the advancement, did so as a portion to his daughter, which he was anxious to settle and preserve for her and her children of the marriage; so that his giving to her an interest

(*f*) 5 Ves. 79.

(*g*) See *Alleyn* v. *Alleyn*, 2 Ves. sen. 38.

for life only is explained by the circumstances; and such an advancement is in no wise inconsistent with an imputed intention that the daughter should not have double portions. It is conceived, therefore, that in those instances the advancements would be ademptions of the testamentary provisions.(*h*)

Having considered what are and what are not ademptions of the legacies of parents to their legitimate children by subsequent advancements, the next subject will be—

SECT. II. The Ademption of Legacies by subsequent advancements, when the legatees are considered STRANGERS to the testator, and the legacies not as portions.

Persons are *primâ facie* to be considered strangers to a testator in relation to the present subject, who do not fall under the description of his legitimate children. But although such be the general rule, still a testator may have placed himself in *loco parentis* to individuals who do not naturally or judicially stand in the relation of children to him; to which cases, what has been already said upon ademption of legacies as between parent and legitimate child, will be applicable. When a testator is to be judiciously considered as having assumed the situation or office of a parent in providing for a legatee, will be afterwards discussed. In the mean time we shall—

First, proceed to consider the doctrine of ademption as applicable to legacies given to strangers.

In *Debeze* v. *Mann*,(*i*) Lord *Thurlow* said, that "if a legacy be given for a *particular purpose*, and the testator afterwards advances money for the *same purpose*, it was too late to say it was not a *presumption* that he meant to execute it." A principle acknowledged by Lord *Manners*, Chancellor of *Ireland*, to the following effect: "Suppose (said he) *A.* bequeathed to his brother 5000*l.* to buy a house in *Merrion-square;* and that after *A.* bought one, which he gave to his brother; are there two houses to be bought?"(*k*) According to this reasoning, if a testator give a legacy of 100*l.* to *C.* to place him as an apprentice, or to purchase furniture, and the testator after the date of his will advance 100*l.* with *C.* as an apprentice fee, or give him that sum to buy furniture; either of those acts will be an ademption of the legacy.(*l*)

But it is requisite that the purposes of the legacy and advancement should exactly correspond, otherwise the legacy will not be adeemed.

Suppose, then, the legacy to be given to *A.* "to fit her out for *India*, or to dispose of her in marriage;" and the testator, *after* the marriage of *A.* with *B.* gave them 600*l.*, which was the case of *Debeze* v. *Mann*;(*m*) Lord *Thurlow* decided, that the 600*l.* was not an advancement, but a general gift, being *after* marriage; and that there was no evidence nor presumption that the gift of 600*l.* to two married persons was an execution of a testamentary gift; and that, therefore, the legacy was payable.

So also in *Roome* v. *Roome*,(*n*) *B.* directed his executors to place

(*h*) See Lord *Eldon's* observations in *Trimmer* v. *Bayne*, 7 Ves. 516.
(*i*) 2 Bro. C. C. 166. and a proposition confirmed by Lord *Eldon* in *Trimmer* v. *Bayne*, 7 Ves. 516. (*k*) 1 Ball. & Beat. 303. (*l*) *Rosewell* v. *Bennett*, 3 Atk. 77.
(*m*) 2 Bro. C. C. 165. and see *Robinson* v. *Whiteley*, 9 Ves. 577. 579.
(*n*) 3 Atk. 181.

1000*l.* at interest, and to apply the whole or such part of the *interest* as they thought necessary for the *support and education* of his grandson *C.;* and further, to appropriate all or any part of the principal and interest in binding him an apprentice, or for his advancement in life, as they thought proper; the surplus, if any, to be paid to him at his age of twenty-one. After this, *B.* placed *C.* to a haberdasher, and paid with him 126*l.* The question was, whether by that advancement the legacy was partially adeemed? And the Master of the Rolls decided in the negative, for the following, amongst other reasons; that the 1000*l.* were not bequeathed for the *sole* purpose of putting *C.* out as an apprentice, but for *other purposes*, viz. maintenance, &c.

And since, in the construction of double portions, it has always been considered requisite that both of them should be certain;(*o*) *a fortiori* the like construction must prevail when the testator stands in the relation of a stranger to the legatee.

Accordingly, in *Spinks* v. *Robins*,(*p*) *A.*, who lived several years with Mrs. *Robins* previously to her death, bequeathed to the two daughters of that lady 1000*l.* a-piece, to be *paid at twenty-one*, with survivorship between them if either died under that age. *A.* afterwards gave two bonds to *B.* and *C.* for 2000*l.* each, *provided* they married during his life with his consent, or in case they survived him; and Lord *Hardwicke* determined that the legacies were not adeemed by the bonds; the legacies and subsequent gifts depending upon different contingencies.

In instances where the bequest is general, and made by a stranger, or other person than a parent, not having placed himself *in loco parentis*, and no intention legally appears, that a subsequent advancement was made with a view to adeem the legacy; such advancement will not have that effect; for since there is no such obligation upon the testator to provide for the legatee, as subsists between a parent and child, no inference arises that he intended by the subsequent gift or advancement, to perform any such duty *in præsenti*, which he had provided for by will after his death.(*q*) And there is no reason why a person should not be entitled to as many gifts as another chooses to bestow. Grand-children, brothers, sisters, uncles, aunts, nephews and nieces, are strangers to the testator within the meaning of the present rule. Natural children, too, are in the same situation; for the law does not acknowledge their relation as the children of their putative father,(*r*) a circumstance which places them, in this instance, in a better condition than legitimate children, since a mere advancement to them will not *primâ facie* be an ademption of a legacy given by their father. As then, natural children are judicially considered in the character of strangers to their parents, the distinction which will be noticed upon the subject of ademption in this section, generally apply to them. We shall, however,—

First consider the authorities where the bequest is made by collateral relations, and strangers to the legatees.

In *Shudal* v. *Jekyll*,(*s*) *A.* the *great uncle* of *B.* and *C.* bequeath-

(*o*) *Supra*, p. 262. (*p*) 2 Atk. 491.
(*q*) See *ex parte* Dubost, 18 Ves. 153. (*r*) 18 Ves. 182. (*s*) 2 Atk. 516.

ed to them, while their father was living, legacies of 1000*l.* a piece. Previously to *B.'s* marriage with *D.*, *A.* in consideration of it, advanced to *D.* 500*l.* Lord *Hardwicke* was of opinion, that the advancement was not an ademption of the legacy, either wholly or in part; because it was not a transaction between parent and child, nor by a person who stood *in loco parentis*.

Similar to the last was the case of *Powel* v. *Cleaver*,(*t*) in which *B.* devised 6000*l.* to his niece, *C.* her father being then living;(*u*) the 6000*l.* was not expressed to be a portion. *B.* afterwards, upon *C.'s* marriage, advanced to her 5000*l.*; that sum being *called her portion* in the settlement made on the occasion. There were also entries in *B.'s* books, from which it appeared that he made calculations of the sums he had advanced *as a portion*. The question was, whether the advancement was a total or a partial ademption of the legacy? And Lord *Thurlow* decided, that it was neither the one nor the other, but that *C.* was entitled to the legacy.

His Lordship's judgment was founded on the principle, that the case was not one of parent and child, nor of a person who had voluntarily assumed the relation of a father; that the legacy was not given as a portion but a bounty; and that although the advancement was called a *portion*, the term should not have the same import and consequence in the instance of a stranger using it, as it would have if adopted by a parent.

In the modern case of *Wetherby* v. *Dixon*,(*x*) *A.* gave a legacy of 1000*l.* to *B.* a stranger to the testator. *A.* at different times afterwards, purchased 2400*l. three per cent.* reduced bank annuities in his own name; but before his death he transferred them into the joint names of himself and *B.* *B.* survived *A.*; and the question was, whether by the transfer the legacy was adeemed? And Sir *W. Grant*, M. R. determined in the negative, upon the principle before stated.

So also in *Roome* v. *Roome*,(*y*) the Master of the Rolls considered that a grandfather was in the same situation in regard to the present rule as a collateral relation; observing, that a father was obliged to maintain his child, but that a grandfather was not obliged to maintain a grand-child; and that a father could appoint a testamentary guardian of his child, which its grandfather could not do.

SECONDLY,—With respect to natural children.

Although it has been often attempted to place natural, upon an equality with legitimate, children, the endeavour has as frequently failed for the reason before stated.

Accordingly, in *Grave* v. Lord *Salisbury*,(*z*) (the first case before Lord *Thurlow*,) Lord *Salisbury* having several natural children, to whom he had given legacies, not so described, afterwards made provision for them in his lifetime, but not *ejusdem generis*, giving the living of *Hatfield* to one, a farm and stock to another; upon which latter gift the question arose. It was contended to be an ademption, upon the presumption arising from an advancement made by a pa-

(*t*) 2 Bro. C. C. 499. (*u*) This fact is to be inferred from the argument.
(*x*) Coop. C. C. 279. (*y*) 3 Atk. 183. and see Lord *Eldon's* observations in *Perry* v. *Whitehead*, 6 Ves. 546.
(*z*) Stated 18 Ves. 152, and 1 Bro. C. C. 425. and see *infra*, under the title "Parol Evidence."

rent to his legitimate child, before considered. And Lord *Thurlow* directed a Master to inquire into the circumstances, but the Master made no report of the relation of the testator to the legatees; and his Lordship refused to send it back to him on that account, observing, that the object of Lord *Salisbury* might have been to conceal that relation. The Court, therefore, without deciding what would have been the result if that relation had appeared, considered it sufficient that the case stood as one of a *stranger*, so that the gift was not an ademption of the legacy.

But circumstances may form exceptions to the general rule as,—

2. Where a testator takes upon himself the relation and duty of a parent, which may not only happen when he is collaterally related, or the putative father of the legatee, but where no relationship subsists between them. When the testator's assumption of the office of a parent is established, his legacy will be considered a portion, and a subsequent advancement will be an ademption in all cases where it would be so, if made by the natural parent, and which have been before discussed.

The only difficulty is to ascertain, what are circumstances sufficient to invest the testator with the assumed relation of parent to the legatee, and the evidence competent to prove that he placed himself in such character. The uncertainty of what that evidence ought to be, is confessed by Lord *Eldon* in *ex parte Dubost*,(*a*) where he observes "whether it is to be *written* evidence in the will and settlement, or the *conduct* observed at the marriage, or to be derived from *mere declarations*, is left so much afloat, that there is considerable difficulty in making a judicial decision upon it."

The test in those cases seems to be, whether the circumstances, taken in the aggregate, amount to moral certainty that a testator considered himself in the place of the child's father, and as meaning to discharge that natural obligation which it was the duty of a parent to perform, for that is the principle. The mere circumstance of a provision made by a relation being so usual without any intention to interfere with the relative obligation between parent and child, that no clear inference arises from such a provision that the testator meant to substitute himself *in loco parentis*.

It seems a natural consequence from what has been observed, that in questions upon this subject, it must be a material feature in each case whether the father of the legatee be living or dead at the time when the will was made. If living, it appears from the before mentioned cases of *Shudal* v. *Jekyll*, *Powel* v. *Cleaver*, *Grave* v. *Salisbury*, and *Roome* v. *Roome*, that the mere connexion of grandfather, or collateral relation, or putative father to the legatee will of itself be insufficient evidence of the testator's intention to place himself *in loco parentis*, to the extent of incurring and paying the moral debt contracted by the father of the child; consequently a subsequent advancement by such a testator will not come within the general presumption of ademption as between parent and child.(*b*) And it would seem from the observations in *Roome* v. *Roome*,(*c*) a case

(*a*) 18 Ves. 152.
(*b*) See Lord *Eldon's* observations in *Perry* v. *Whitehead*, 6 Ves. 548.
(*c*) 3 Atk. 181.

where the father of the legatee was dead when the will was made, that such circumstance would not of itself be a sufficient manifestation of the testator's intention to place himself in the situation, and to incur the obligation last mentioned.(*d*)

Upon the whole it may probably be considered that although the legatee may have been advanced by the testator during his life, and brought up by him, and who, in a sense, may be considered as standing in the relation of a father to the legatee; yet if the natural father be living, and he be described in the will as father of the legatee, and the legacy is not expressly given as a portion, the testator will not be considered as having by the bequest meant to perform the father's duty in providing for the child, but merely to give the legacy as a bounty, so as not to be adeemed by a subsequent advancement.(*e*)

Thus in *ex parte Dubost*,(*f*) *A.* having three natural daughters by *B.* the wife of *C.*, bequeathed to them *nominatim*, and as the daughters of *C.*, 4000*l.* a piece. He also gave to their supposed parents unequal legacies. *A.* afterwards upon the marriage of *D.* one of the daughters, advanced for her 3000*l.* as a marriage portion, which, from the settlement, appeared to have been received by her husband; and the question was, whether *D.'s* legacy was adeemed by the advancement? And Lord *Eldon* decided in the negative, and said, "recollecting how artificial the rules are, where a person has educated a child through life, considering himself as standing in relation of putative father to that child, having a father acknowledged, describing that child as the child of a mother named and a father named, and also making a provision for the father and mother; it would be too much upon such a will, to say, this is the case of a person, meaning to pay, not what the Court calls a debt of nature, but a debt he meant to contract, or in other words meaning to place himself *in loco parentis*, in the situation of the person described as the lawful father of that child."

That a person may assume the relation and duty of parent, appears from *dicta* in all or in the great majority of the cases; and Lord *Hardwicke* has supposed an union of circumstances, which in his opinion will be sufficient to place an individual *in loco parentis*. "Suppose, (said he) a female to be an *orphan*, and under the care of a collateral relation, who bequeaths to her a legacy, *expressing* it to be for her *portion*, and afterwards makes provision for her in his lifetime; I should be inclined to think that this would be ademption."(*g*)

Three things are observable in the case supposed, viz. that the child should be an *orphan*, (a circumstance which distinguishes it from *ex parte Dubost* before stated;) that it should be under the *care* of the testator, and that the testamentary gift should be *expressed in the will* as a *portion*. Hence it may be inferred to have been Lord *Hardwicke's* opinion, that parol evidence was admissible to show the relation, real or assumed, between the testator and legatee; but that it was not admissible, in the first instance, to prove that the legacy, appearing on the face of the will as a *bounty*, was intended by the testator as a *portion*. For the admission of parol evidence in the

(*d*) See also *Shinks* v. *Robins*, 2 Atk. 491. stated *supra*. p. 266.
(*e*) 18 Ves. 154. (*f*) Ibid. 140. (*g*) 2 Atk. 518.

latter case would, in violation of the statute of frauds, have the effect of altering or defeating the written instrument; first, by raising a presumption that the testator intended to place himself *in loco parentis* when he made his will, and then, consequently, by bringing into operation the before mentioned rule respecting ademption as in the case of parent and child.

In *Monck* v. *Monck*,(*h*) we are supplied with a decision, founded upon the construction of instruments, or in other words upon *written* evidence; pronouncing that a *brother* had clearly shown at the date of his will, an intention to assume the character of a father to his legatee; and to perfom the debt or duty which was owing by the natural parent. In that case *A.* recited in his will, that he had, upon the marriage of his brother *B.* given a bond for 5000*l.* to the uses of *B.'s* marriage settlement, and as a *provision* for him. *A.* then bequeathed to his *brother C.* the like sum of 5000*l.* directing his trustees to pay the interest to *C.* for life; and in case of his marriage, *A.* empowered him to settle part of the interest to the annual amount of 150*l.* as a jointure upon his wife; and bequeathed the capital to the issue of the marriage; on failure of whom the 5000*l.* was to lapse into *A.'s* real estates, for the benefit of his eldest son. After the date of this will, *C.* married; and upon that occasion *A.* gave a bond for 4000*l.* to the trustees in *C.'s* settlement; the interest of which sum was limited to *C.* for life, then to his wife for life; and the capital was to be divided amongst the issue of the marriage as *C.* should appoint; but if there were no issue, who should become entitled to the 4000*l.*, the money was to be assigned to *A.* his executors, &c. who had, before the present transaction, and after the will was made, advanced 1000*l.* to *C.* to enable him to purchase a house. The question was, whether these advancements were an ademption of the legacy of 5000*l.*? And to prove that they were, *parol* evidence by *A.'s* relatives was offered and admitted. Lord *Manners*, Ch. decided that the legacy was adeemed; and for this reason, that it clearly appeared *from the will and settlement*, that *A.* intended, and had placed himself *in loco parentis* to his brother *C.* whence arose the presumption against double portions which subsists between parent and child; and the presumption being *so* raised, parol evidence to *confirm* it was admissible.

The last is a very strong case, to show that the testamentary provision by the brother was intended as a portion for *C.* The will so states the fact; and it appears from the contents that *A.* adopted his two brothers into his family, and provided for them in the same manner and to the same amount(*i*) as for his own children. So that if an advancement to his child would be a presumptive ademption of its legacy or portion, for the same reason, an advancement to the brother must be attended with the like consequences.

3 and 4. But it remains to be considered how far *parol* evidence may be adduced, to show that a testator intended to substitute himself *in loco parentis*, when that intention cannot be ascertained upon the face of the will. And as the principles for admitting parol evidence in that case equally apply to its admissibility, when offered to

(*h*) 1 Ball. & Beat. Ca. in Eq. in Ireland, 298. and see *Trimmer* v. *Bayne*, 7 Ves. 508.

(*i*) 1 Ball. & Beat. 304.

prove the intention of a (stranger) to adeem, by advancement, a legacy he had previously given; both subjects are necessarily blended in the present consideration.

When the uncertainty and perplexity which obscure these two subjects, and Lord *Eldon's* observations relative to the former of them are considered, due allowance, it is hoped, will be made for the difficulty of attempting to present the reader with a satisfactory view of the rules, which regulate the admission of parol evidence in the instances before us, together with a concise arrangement of the cases in illustration of those rules: nor can it be expected that such an attempt will be entirely successful, as the subject presents a labyrinth of discordant cases and opposing *dicta*. The only clue towards a satisfactory termination of the inquiry, must be an examination of each case and *dictum*, by the test of those principles, upon which the admissibility of parol evidence in general, has been admitted.

In early times, parol evidence was admitted in relation to written instruments with great jealousy. Lord *Talbot* is an authority for the assertion, that previous to the year 1734, none of the cases had gone further in the admission of this kind of evidence, than to *rebut* an equity or a resulting trust; instances in which the parol testimony tended to support the intention of a testator, consistently with his written will.(*k*) Under this class of cases, may be placed those authorities, where an executor has a legacy given to him, and the residue is undisposed of. Here a court of equity interferes, upon a presumed intention, that the testator, in giving a *part* of his personal estate to the executor, who at law is entitled to the *whole*, meant him to take no more than the specific share; consequently, the Court converts him into a trustee for the next of kin. This doctrine of equity, it must be remarked, is founded upon *presumption*, not raised by parol, but upon the testator's will, *viz.* the legacy therein given, and whence the above presumption springs; being a presumption, it may be repelled by parol evidence, and consequently confirmed by it. This is established by a variety of cases, from that of Lady *Granvill* v. The Duchess of *Beaufort*,(*l*) to the case of *Langham* v. *Sanford*;(*m*) but such evidence is inadmissible without the prior gift of a legacy, or an inference to the exclusion of the executor, collected from the contents of the will;(*n*) for the holding of the contrary, would be not to rebut, but to *raise* an equity by parol, in contradiction to the legal import of the will.

Another class of cases upon the present subject is, where there is no error or ambiguity *patent* upon the face of the will, but there happens to be a *latent* doubt or mistake discovering itself, when the words of the will are attempted to be applied to the person described, or to the subject given. In those instances *parol* evidence is admitted to ascertain the person and the subject of the bequest. The former was done in *Beaumont* v. *Fell*,(*o*) where the legatee was described as *Catharine Earnley* instead of *Gertrude Yardley;* a de-

(*k*) Forrest, 242.
(*l*) 2 Vern. 648.
(*m*) 17 Ves. 435. 2 Meriv. 6. see also *Lynn* v. *Beaver*, 1 Turner, 68. per Lord *Eldon*; also, chap. xxiv.
(*n*) *Osborne* v. *Villiers*, 2 New Abr. 426. and see 2 Meriv. 17. and *White* v. *Williams*, 3 Ves. and Bea. 73.
(*o*) 2 P. Will. 140.

termination, the principle of which has been ever since acted upon in a variety of instances.(*p*) The latter occurred in the cases produced in the fourth section of the fourth chapter,(*q*) where the testator having no property in the specific fund described by him, yet possessed property in another, as when he bequeathed so much three per cent *reduced* annuities, having no stock of that description, but possessing stock in three per cent *consols*. In such and the like cases, it being unavoidable to resort to the testator's estate to find the property described, the slight difference in the description between the fund and the state in which it is actually found, raises a *presumption*, that such variance was founded in mistake, and that the legatee was intended to have the stock, although it did not literally answer the terms of the bequest. Upon that principle it is, and not upon any extrinsic evidence directly brought to explain or correct the will, upon the alleged intention of the testator, that the legacy is supported.

The next class of cases in which parol evidence has been admitted, is founded in the relation between parent and child. A court of equity, without any intention expressed by the father, raises a *presumption*, upon the natural obligation he is under, to provide for his own immediate offspring, that a gift either by deed or will, is intended by him not merely as a bounty, but a portion, a payment of the debt, which by nature he contracted, to his child, as before noticed ;(*r*) so that if the provision be by will, and the father afterwards advance the child upon marriage, the latter will adeem the former, except a different intention be proved; for this, like the case of the executor, being a presumption, may be destroyed by the application of verbal testimony, or it may be confirmed by the same species of evidence.

Thus in *Biggleston* v. *Grubb*,(*s*) parol evidence was admitted to show that a father gave 500*l.* upon his daughter's marriage, to her husband, in full discharge of a sum of 500*l.* which he had left her by his will.

So in *Rosewell* v. *Bennet*,(*t*) Lord *Hardwicke*, allowed parol declarations of a father, in proof that 200*l.* advanced by him in placing his son a clerk in the Navy Office, were intended by the father in satisfaction of a legacy of 300*l.* given by his will to the son.

The like doctrine is established by the cases of *Hoskins* v. *Hoskins*,(*u*) *Robinson* v. *Whitley*,(*x*) and *Thellusson* v. *Woodford*.(*y*)

All the cases which have been noticed are upon *presumptions*, arising either from the act of the testator in writing, or in consequence of *latent* ambiguities, or upon presumptions founded upon the relation of the parties; instances in which there is no doubt that parol evidence is admissible. To these may be added another instance, more immediately falling within the subject of the present section, viz.

Where a stranger or putative father gives a legacy for a *particular* purpose, *expressed* in his will, and afterwards advances money

(*p*) See 1 P. Will. 421--425. 2 Ves. sen. 216. Ambl. 374. 1 Ves. jun. 266. 3 Ves. 148. 6 Ves. 42. 12 Ves. 279.
(*q*) *Ante*, p. 219. *et seq.* (*r*) *Ante*, p. 255. (*s*) 2 Atk. 48.
(*t*) 3 Atk. 77. (*u*) Pre. Ch. 263. (*x*) 9 Ves. 577.
(*y*) 4 Madd. 420.

for the *same* purpose. In such a case, a *presumption* is raised upon the unity of purpose, that the execution of it by an advancement in his lifetime, was meant in substitution of his testamentary provision made, as expressed, to promote the same end; and consequently that the advancement is an ademption of the legacy, as before noticed.(*z*) But since this doctrine is founded upon a presumption, it follows, that such presumption may be repelled by parol testimony of a contrary intention, or the inference may be strengthened by confirmatory evidence.(*a*)

There can be no question about the subsequent gift being an ademption, when the motive for giving the legacy and making the advancement appears in the will and by deed; but to what extent parol testimony is admissible to show that a legacy was intended as a portion, or a gift intended a substitute for a legacy, or that a person had assumed the relation of a parent, remains to be considered.

It is a first principle of law that a will cannot be explained by any thing but itself.(*b*) Hence it is incapable of being altered, detracted from, or added to, by *parol;* nor can oral testimony be admitted to prove *upon what terms* a legacy was given.(*c*) Applying this doctrine to the points now under consideration, it seems to follow, that since a legacy by a stranger judicially imports mere *bounty*, the nature of the bequest cannot be changed(*d*) by its conversion into a *portion*, through the medium of *parol* evidence directly and in the first place applied to the *motive* for making the bequest. The Statute of Frauds appears to forbid any such application.(*e*) And unless, as has been shown, the gift by will were *expressed* to be a portion, or a legacy for a particular purpose, and the advancement was made for the same purpose, there would be no presumption of an intent to adeem the former by the latter, as then there would exist no presumption to repel or to confirm, it is conceived that there could be no pretence or principle for admitting parol evidence to *alter* the legal import of the expressions in the will, for the purpose of defeating the legacy by a *presumed* intention to adeem it, and that presumption *raised* by oral testimony directly applied to the instrument, and in opposition to its legal construction and effect. So powerfully was Sir *W. Grant*, M. R. impressed with the impropriety of admitting parol evidence in those cases, as even to doubt in *Hartopp* v. *Hartopp*,(*f*) (a case of parent and child), whether in strictness it were competent in the *first instance* to give evidence of declarations that the father *intended* to substitute the portion advanced by him in the place of that he had bequeathed, a doubt in which his Honour had been preceded by Lord *Rosslyn* in *Freemantle* v. *Banke's*.(*g*) But when it is considered that in instances of parent and child, a *presumption* is raised upon that relation which springs immediately upon the advancement of the portion, the legacy being also a portion whether so expressed or not;(*h*) it seems to be consistent with the principles

(*z*) See *ante*, p. 265. and 2 Bro. C. C. 166-521.
(*a*) 2 Bro. C. C. 166. and *Trimmer* v. *Bayne*, 7 Ves. 508, stated *infra*, p. 281.
(*b*) See *ante*, p. 222.
(*c*) By Lord *Eldon*, 16 Ves. 486. and see *Brown* v. *Selwin*, Forrest, 240.
(*d*) Vide chap. IV. sect. 4, *passim*, and particularly p. 222.
(*e*) 29 Car. II. sect. 22.
(*f*) 17 Ves. 192.
(*g*) 5 Ves. 79-85.
(*h*) *Supra*, p. 257.

which admit parol evidence, to confirm as well as to rebut presumptions, to authorize its admission directly, and in the first instance in regard to the father's intention to adeem the testamentary portion by an immediate advancement. For the effect of the permission is not to *raise* but to confirm a presumption. The case, however, is widely different from that of a stranger and his legatee when the bequest is *general*, and parol evidence of intention is offered either to convert the legacy into a portion, or to prove that the testator intended by a gift to adeem a general bequest he had made. In neither case is there any presumption to confirm or repel, and the oral testimony is, in the first case, brought directly to explain and alter the will, and in the second to revoke a legacy by *parol*.

The same observations equally apply in objection to the admission of parol evidence, in the *first instance*, to prove that a putative father *intended* a portion by a legacy he had given generally to his natural child; or that he or any other person *intended*, by giving a legacy, to assume the relation of legitimate parent to the legatee; for were parol evidence admissible in such cases, it would have the effect of explaining and altering the effect of a written will.(*i*)

The grounds upon which the several conclusions before mentioned are founded, have been minutely detailed, and are submitted to the consideration of the reader. There are, however, cases and *dicta* in opposition, which will be our next subject.

In the case of *Chapman* v. *Salt*,(*k*) the Master of the Rolls admitted evidence to show that a note for 50*l.* given by *A.* to *B.* was intended by *A.* in substitution of an equal sum bequeathed by him to *B.* The reason assigned for the reception of the evidence was, that the question was *testamentary*, and the evidence as a *necessary* consequence admissible. But what his Honour intended by the term "testamentary," does not appear. This, however, is certain, that there are many testamentary questions in which parol evidence cannot be received.

Similar to the last, is the case of *Shudal* v. *Jekyll*,(*l*) in which Lord *Hardwicke* admitted oral testimony of the testator's intention, that what he had advanced was *not* in substitution of what he had given by will; and his Lordship observed, that parol declarations had been constantly admitted in those instances. But the cases have been sought for in vain; and it is to be remarked, that the present, being a case of a *stranger*, the advancement was not an ademption of the bequest;(*m*) so that such evidence, even though admissible, was not necessary to entitle the legatee to both gifts. It seems difficult to discover the principle upon which the evidence was admitted in the last case, consistently with the grounds upon which we have seen that it has been received in other instances; for it is a settled *rule* of law, that a person is entitled to as many gifts from another, as the donor chooses to bestow; consequently, an advancement and *a general* legacy are accumulative, and there arises no *presumption*, the one way or the other, to be confirmed or repelled by parol testimony. In such a case, a court of equity

(*i*) *Sed Vide*, 18 Ves. 154; but see the remaining observations upon this subject.
(*k*) 2 Vern. 646. (*l*) 2 Atk. 516. (*m*) *Ante*, p. 265.

would surely be proceeding to an extreme length, if it were to permit an executor to show by parol evidence, that a testator *intended* to adeem his legacy by an advancement; and, acting upon such testimony, to revoke a written bequest by parol declarations. If, then, that evidence would be rejected (and it is presumed that it would) when offered by the executor, it is conceived that it would be equally inadmissible, if produced by the legatee, to prove that the testator intended him to take the legacy as well as the subsequent gift.

Lord *Thurlow* seems to have followed the steps of Lord *Hardwicke* in *Powel* v. *Cleaver*,(*n*) and *Grave* v. Lord *Salisbury*;(*o*) in which latter case Lord *Thurlow* directed a Master to inquire into the circumstances of the advancement; a reference that his Lordship would not have made, unless he had been of opinion that the legacy might be adeemed by parol declarations of the testator that he so intended.

The above are the principal cases in favour of the admission of parol evidence to prove the ademption of a *general* legacy from a stranger by a subsequent gift or advancement; cases which appear to have induced Lord *Eldon* to express a dubious opinion in *ex parte Dubost*,(*p*) that a legacy by a stranger (though a *bounty*) might be proved to *mean* a *portion* by evidence applying *directly* to the *gift* proposed by the *will*. And towards the conclusion of the case, his Lordship, referring to *Powel* v. *Cleaver*, considered that case an authority for admitting evidence of the testator's intention, when he made his will, to give a portion as parent (although a legacy upon the face of the will,) or as standing *in loco parentis*, and to satisfy the bequest in the whole or in part by the subsequent advance.

It cannot be denied that the cases decided by Lord *Hardwicke* and Lord *Thurlow*, and the opinion of so profound a lawyer as Lord *Eldon*, are of great weight; but on the other hand, we should advert to the grounds upon which those authorities rest, and consider the impolicy of admitting *parol* evidence beyond the limits adhered to in the several cases before stated; namely, that of rebutting equities and resulting trusts, and of confirming or repelling *existing presumptions*, and not of *raising* such presumptions. When to these considerations we add the doubts of Lord *Rosslyn* and Sir *William Grant*, before noticed,(*q*) as to the admissibility of parol evidence in the first instance, to show a testator's meaning to substitute one provision for another; and the declaration of Lord *Eldon*, in *Herbert* v. *Reid*,(*r*) that *parol* evidence could not be received to alter, detract from, or add to a written will, nor to prove upon what terms a legacy was given, it may, at least, be asserted that the points we have been discussing are not finally settled. Probably it will not be deemed assuming too much to observe, that notwithstanding the contrary cases, a court of equity will not *now* admit parol evidence to be *directly* applied to a written will, to prove that a legacy by a stranger was *intended* as a portion; nor that a legacy not expressed to be given for any particular purpose, was *intended* to be revoked by a subsequent verbal gift; nor that a legacy, given by a putative

(*n*) 2 Bro. C. C. 517. (*o*) 1 Bro. C. C. 425. (*p*) 18 Ves. 153.
(*q*) *Supra*, p. 227. (*r*) 16 Ves. 486.

father, was *meant* as a portion; nor that he, or another person, at the time he gave the legacy, *intended* to place himself *in loco parentis*.

Taking it for granted that none of the above circumstances can be admitted in proof when the parol evidence is tendered in the first instance, and directly to explain what a testator *meant* when he made his will, either as to *assumed* relationship to the legatee, or in regard to the *nature* of the bequest; yet since such species of testimony is permitted to ascertain who was the author of the gift, when it does not appear upon the face of the transaction, and also to ascertain whatever is wanting to show the consideration, and *from whom* it moved, provided the evidence does not contradict the instrument,(*s*) it seems to follow, that the assumption by a person of the relation of parent to the legatee may be proved circuitously; which fact, when established, will be attended with all the same consequences, as to double portions and ademptions, which would ensue if the legacy had been given and the advancement made by the father of the donee and legatee. It seems, however, that those results must be obtained from the establishment by parol of facts *dehors* the will *from which* the relation may be *presumed;* as that the father of the legatee was dead when the will was made; that the legatee resided with, was supported and educated by, the testator, and that he treated the legatee as his own child:(*t*) from such evidence it is conceived a *presumption* would arise that the testator had assumed the office and duty of a parent; and this presumption, attaching itself to the legacy and to the subsequent advancement, would have the effect of converting the legacy into a portion, and thus subject it to the influence of the rule respecting ademption, as in the case of parent and child. But as this consequence follows from *presumption* merely, it may be defeated by evidence of intention, in opposition to such presumption; or, on the other hand, it may be confirmed by corresponding testimony. By this method of procedure no evidence of *intention* is *directly* adduced in explanation of, or in contradiction to, the written will; but the object of the testator is attained without infringing upon any rule of law, for the assumed relation is presumed upon the evidence of facts, proof of which, as we have seen, is not to be refused.

The above reasoning, it will be observed, does not apply, when the testator is a stranger, not standing *in loco parentis*, and it is proposed to offer parol evidence of his declared intention, at the time of the advancement, to substitute the gift for the legacy; in that case there is no collateral fact to be established inconsistent with the legal right of the legatee to take both the gift and the legacy. There is no presumption from the advancement of an intent to adeem the bequest because the law gives both to the legatee;(*u*) so that the evidence, if produced in that case, would tend directly to repeal a written bequest; for which it is conceived to be inadmissible. And, as we have seen that oral testimony is not allowed to prove a consideration inconsistent with an instrument in writing, it should seem that parol evidence of the testator's intention to substitute the gift for the legacy, and thus to defeat the latter, is likewise inadmissible.

(*s*) 17 Ves. 192. (*t*) These conclusions are drawn from the case supposed by Lord *Hardwicke* in *Shudal* v. *Jekyll*, 2 Atk. 518. (*u*) *Supra*, p. 265.

The last observations, however, must be considered as confined to instances where the legacy is *general*, and the testator does not stand *in loco parentis;* for we have seen that when a legacy is given by a stranger expressed to be for a *particular* purpose, and he afterwards advances money for the *same* purpose, a *presumption* arises that he intended the gift in substitution of the bequest.(*x*) When, therefore, the will declares that the consideration for the legacy is that it may answer a particular object, a court of equity cannot refuse to receive parol testimony of that object having been completed by the testator during his life. The presumption is, in this case, *inchoate* from the expressions in the will, and its completion can be only ascertained by inquiry, or the admission of parol evidence of the purpose for which the subsequent advancement was made. The proof does not, as in the other instance, militate against the instrument, or its legal import. And if the advancement appear to have been made for the same purpose as that expressed in the will, the legacy is necessarily adeemed upon the *presumption* arising from the unity of object and its performance by the testator himself; but since the ademption is founded upon presumption, it follows, that such presumption may be repelled or confirmed by oral testimony, as before observed.(*y*)

Under this head may be classed the case of *Debeze* v. *Mann*,(*z*) in which a legacy of 1325*l.* was given by the testator to his putative daughter, to fit her out for *India*, or *to dispose of her in marriage*. He afterwards, *upon her marriage*, advanced for her 1000*l.* as a portion by giving a bond to her intended husband; and he subsequently to the marriage, gave her 600*l.* to buy furniture; the total advancement being 1600*l.* At the first hearing of the cause, Lord *Thurlow* admitted evidence of a parol declaration by the testator, to the husband's father *before* the marriage, that there would be more at his death than 1000*l.* for his putative daughter, upon which evidence his Lordship decided that the presumption of the legacy having been adeemed by the advance of the 1000*l.* was repelled; and that there was neither evidence nor presumption to show that the 600*l.* was an execution of the testamentary gift. It is proper to remark that Lord *Thurlow* said upon rehearing the cause, that he did not rest his judgment on the witness referring to *an intention* in the testator to do more at his death for his putative daughter. But if Mr. *Brown's* report of the case be correct, it is clear that his Lordship's decree was founded upon the fact of the testator's declaration, that his advancement was not all he intended to do for his daughter. And "connecting the future advancement of 600*l.* with the testator's death, by the expression used about his life, as an advance at that time, the *principle* of the decision appears to be, that the advancement of 1000*l.* and 600*l.* would not, within the meaning of the conversation between the two fathers, adeem what was given by the will."(*a*)

Having in the last few pages attempted to ascertain in what instances parol evidence is admissible to prove an intention to adeem portions and legacies by subsequent advancements; it is proposed to consider in the next place—

(*x*) *Ante*, p. 265. (*y*) *Supra*, p. 339. (*z*) 2 Bro. C. C. 165.
(*a*) By Lord *Eldon*, 7 Ves. 517.

5. What testimony will and will not be sufficient to prove the testator's intention so as to effect an ademption, when parol evidence can be received on those subjects.

It appears from the view which has been taken of the admissibility of parol evidence, that it is only allowable to confirm or repel presumptions. In order to rebut the presumption of ademption from a subsequent advancement, the testimony must be clear and relevant, not merely presumptive, but a demonstration, from the language and conduct of the author of both provisions, that he considered the gift by will as a subsisting benefit.(*b*) And it is required to be equally so whether the legacy be a portion, or be given by a stranger for a *particular* purpose, the advancement for the *same* purpose perfecting, as we have seen, the presumption of an intent to adeem the bequest. We shall,—

First, consider what evidence will be sufficient to repel the presumption of an ademption from a subsequent advancement.

Since the advancement must, as we have seen, be made for the same purpose as the legacy was given, in order to found a presumption of an intent that the former should go in substitution of the latter, it follows, that if the bequest be of a portion, and the parol evidence show that the advance was expressed to be given for a partial or a different purpose; or if the bequest were of a legacy for a particular object, and the evidence proved that the subsequent gift was made for another, the testamentary portion or legacy would in neither instance be adeemed by the posterior advancement.

In *Robinson* v. *Whitley*,(*c*) *A.* the father bequeathed to his daughter, *B.* 1000*l.* to be paid upon her marriage. She married during *A.'s* life in *December* 1801, the will being made in the preceding *November*. Some months after the marriage *A.* paid to *B.'s* husband 470*l.* part of 500*l.* which, as appeared from the evidence of *C. A.'s* widow, he declared to her in a private conversation before such marriage, that he would give *B.* so soon as she should be united to her present husband, *as they would want furniture*. *C.* further deposed as to her belief that *A.* meant the 500*l.* in addition to what he might leave *B.* by his will; and that she never heard him declare an intention that such sum should be taken in lieu, or in part satisfaction of the legacy. Sir *W. Grant*, M. R. decided that *A.* the father having appropriated the 500*l.* to a particular purpose, which appeared to be the sole motive for the advance, but which he had not expressed in giving the testamentary portion, the advance was to be considered a *new* gift, the occasion of which repelled the presumption that it was meant in lieu or in part payment of the legacy. Indeed if the presumption had prevailed, it should seem, from what has been noticed in a preceding page,(*d*) that the whole portion would have been adeemed, since the case supplied no evidence of an intent to restrict that general presumption to a partial satisfaction.

If the evidence prove that a testator, when he made an advancement, referred generally to his will, so as to impress his auditors with ideas that the donee should be further benefitted by his death; such reference will repel the presumption of an intention to adeem the portion or legacy: so that if the testator declared, that "the donee was the *object of his bounty*, and *therefore greater expectations might*

(*b*) 1 Ves. jun. 108. 7 Ves. 522. (*c*) 9 Ves. 577. (*d*) *Supra*, p. 259.

be formed upon that circumstance," or if he said, "she is in my will,"(*e*) or to any such effect; the declaration would preserve the testamentary gift to the legatee,(*f*)

The consequence must necessarily be the same when a testator is more explicit upon making an advancement, and alludes to an intention to leave something to the donee, at his death, but declines to incur any obligation to do so.

Thus in *Shudal* v. *Jekyll*,(*g*) the testator declared before the marriage of his niece and legatee, and when he gave security for the advancement he made upon that occasion, "that he would leave something to her by his will; but that he would not be considered as under any obligation to do so." This declaration was held by Lord *Hardwicke* to be sufficient to repel the presumption of an intent to adeem the bequest by the advancement, and to entitle the niece to the legacy.

So in *Debeze* v. *Mann*, before stated,(*h*) Lord *Thurlow* considered the declaration of the testator to the father of his putative daughter's intended husband, "that there would be more for her at his death than 1000*l.*" to be sufficient evidence to rebut the presumption, that the testator meant by an advancement on his daughter's marriage, to adeem a sum of money which he had previously left her by his will.

And in *Ellison* v. *Cookson*,(*i*) Lord *Thurlow* was of opinion, that if the evidence had gone no farther than the *conversation* between the testator and the person employed by the father of the intended husband of his daughter, which was, that the testator agreed to give her 5000*l.* as a portion, and declared, "that she would have something considerably more at his death, equal or nearly equal to what he intended as her portion," such declaration would have entitled the daughter to the provisions made for her by the will, notwithstanding the portion advanced upon her marriage; one of which provisions was a portion of 5000*l.* But in that case the daughter had expectancies from her mother founded upon the will; and a letter having been written by the testator, explanatory of the conversation which had passed between himself and the person before alluded to, the Court was of opinion, that the terms of the letter might be applied to and satisfied by reference to the daughter's expectancies from her mother, without extending to the testamentary portion of 5000*l.* and that, therefore, the evidence was not sufficiently clear to show that the testator intended such portion to subsist, notwithstanding the one he had given upon his daughter's marriage, so as to prevent the application of the presumption, that the advancement was in ademption of the legacy.

This introduces us to the consideration,

Secondly, of the evidence deemed insufficient to repel the presumption of ademption by a subsequent advancement.

It has been observed that parol evidence, in order to have the effect of rebutting a presumption, is required to be satisfactory; that is, *demonstrative* of the testator's intention, from his language and

(*e*) 7 Ves. 520. (*f*) Per Lord *Thurlow* in *Ellison* v. *Cookson*, 1 Ves. jun. 111.
(*g*) 2 Atk. 516. (*h*) *Supra*, p. 277. and 2 Bro. C. C. 165.
(*i*) 1 Ves. jun. 109. and more fully stated *infra*.

conduct, that he *considered* the gift by will as a subsisting benefit, notwithstanding the advance. Hence conjecture or probability that he meant the legacy to continue after the advancement, will be insufficient; so that, if the evidence amount to no higher degree of certainty, the presumption that the advance was meant in ademption of the legacy will not be repelled. Suppose, then, the legatee to be entitled to several provisions, as a portion, by the will, and the parol evidence produced to repel the presumptive ademption of them does not clearly show, whether the father by his subsequent advancement intended that the whole, or which of his testamentary provisions should continue to subsist; the general presumption, adeeming the portion by the subsequent advance, will prevail.

Accordingly in *Ellison* v. *Cookson*, first determined by Lord *Kenyon*,(*k*) and secondly, by Lord *Thurlow*,(*l*) *A.* the father, bequeathed the residue of his fortune to his wife, charging her with the education of his children, and *empowering* her to provide for them at her *discretion.* After the execution of the will, he wrote upon the paper which contained his testament, instructions for her, by which he appointed 5000*l.* to each of his two unmarried daughters; and with regard to the surplus and the savings of his wife, he directed the first to be applied to the purposes before mentioned, and he ordered the second to be disposed of by her among such of his children as she thought proper. After this, *A.* advanced with his daughter 5000*l.* upon her marriage; and the question being, whether the testamentary portion of the like amount was adeemed by the advancement in consequence of the established presumption; parol evidence was offered of *A.'s* intention, that the portion by will should continue notwithstanding the advance. The evidence consisted of a conversation with *B.* (the brother-in-law of the intended husband, and agent of the husband's father,) and of letters which passed between them before the marriage; and it appeared from the former that *A.* agreed to give his daughter 5000*l.* as a portion, and said that she should have something considerably more *at his death*, equal or nearly equal to what he intended for her as a portion. Now, as the reference was made to *A.'s* will generally, it would have entitled the daughter to all the benefit it contained in her favour;(*m*) but in answer to a letter from *B.* signifying the acquiescence of the intended husband in *A.'s* proposal in the verbal conversation before detailed, *A.* explained what he meant by the expressions he had used, and which he stated to have been misunderstood. The effect of which explanation the Court considered to import, that *A.* meant no more than that the advancement should be in addition to what his daughter *might probably* or *possibly* derive from her mother's appointment under the authority of his will, if the mother survived him; thus restricting the generality of the conversation to this particular contingent benefit, and consequently leaving the advancement to operate upon the testamentary portion of 5000*l.* as if there had been no evidence whatever. The decrees, therefore, were, that the latter sum was adeemed by the advance of equal amount.

(*k*) 2 Bro. C. C. 307.
(*l*) 1 Ves. jun. 100. 3 Bro. C. C. 61. *S. C.* and approved by Lord *Eldon* in *Trimmer* v. *Bayne*, 7 Ves. 517.
(*m*) *Debeze* v. *Mann*, 2 Bro. C. C. 165.

So in *Trimmer* v. *Bayne*,(*n*) a legacy of 5000*l.* was vested in trustees as a portion, to pay the interest to his natural daughter *B.* till her marriage, and on the happening of that event, to pay the capital to her separate use. *A.* afterwards, in *December*, 1794, and in contemplation of *B.'s* marriage, agreed to advance to *C.* the intended husband, 2000*l.* in part of a portion with *B.* and to give a bond for the further sum of 5000*l.* which was accordingly executed, the interest whereof was to be paid by the trustees in the settlement to the separate use of *B.* during the marriage, and afterwards to *C.* if he survived *B.*; and upon the death of the survivor, the principal was to be divided among the children of the marriage according to the appointment of *A.* The marriage took place; and *A.* only paid to *C.* 500*l.* of the 2000*l.* leaving the residue of that sum, and the 5000*l.* upon his bond, owing at his death. The question was, whether the legacy of 5000*l.* was adeemed by the portion provided for *B.* upon her marriage, it being admitted that as both provisions were made for the same purpose, the former would be adeemed by the latter, unless the presumption could be destroyed by evidence of a contrary intention. In order, therefore, to entitle *B.* to the testamentary portion, *parol* evidence was produced and admitted, consisting of the depositions of one Mrs. *Brown* (a person having no interest in the affair, nor employed by any of the parties) of what passed in conversation between her and *A. three months before* the settlement was made; the substance of which was, that *A.* upon her inquiries as to the portion he meant to give *B.* said 5000*l.*; and being pressed to increase the sum, he answered, "she is in my will," intimating when desired to give the whole immediately, that he was only worth 10,000*l.* Lord *Eldon* determined that the evidence was insufficient to rebut the presumption of an intent to adeem, which prevailed in those cases. And his Lordship, after showing the little weight to be placed in such testimony from the clear intention of the testator to disappoint and mislead the officious curiosity of the witness, in giving her false information, as was proved by the will and settlement, both in regard to the amount of his fortune and his ready money advance, decided the question upon the unanswerable principle, that evidence (admitting it to be true and free from the objection last mentioned) of what a person meant to do *three months before* the execution of the settlement, was very deficient and unsatisfactory evidence of his intention when that deed was completed; for, said his Lordship, "it does not necessarily follow, if *A.* in *August* meant to advance 5000*l.* and leave a demand under his will, that he intended in *December* to advance 2000*l.* in money, and agree to advance 5000*l.* and then to leave *B.* her chance under the will."(*o*) Lord *Eldon* concluded a very able judgment in declaring that, upon the whole, the evidence was *not so connected* with the settlement in *December* 1794, as to destroy the effect of that act, operating as an ademption of the legacy; and that it would be extremely dangerous to say that such evidence was sufficient to prevent the attaching of *clear settled rule of law*, if it were not clear and satisfactory to that point, and to which it must be in order to rebut the presumption according to that rule, arising out of the effect of the settlement.

(*n*) 7 Ves. 508. (*o*) 7 Ves. 621.

The last case suggests the remark, that the peculiar circumstances which induced the testator to express himself to the witness *Brown*, as before mentioned, prevented his declaration that his daughter "was in his will," having the effect of repelling the presumptive ademption, and which, as we have seen, would otherwise be the consequence of such and similar expressions.

It remains to consider,

6. The different degrees of importance to be attached to parol evidence in respect of the periods when the verbal declarations were made, and the situation of the witness to whom the testator expressed his sentiments.

These points were alluded to by Lord *Eldon*, in the last case, who seems to have been of opinion, that, although it did not appear that the witness *Brown* was employed as an agent, or related to any of the parties, or in the slightest decree interested in the affair, her evidence of what the testator declared was admissible; and his Lordship observed, that a testator's declarations were evidence, whether consisting of conversations with people in no wise concerned in it, or with persons making impertinent inquiries and drawing from him angry answers, or in whatever form the declarations were made. But his Lordship remarked, that such declarations were entitled to very different weight and credit in relation to the time when, and the circumstances under which they were uttered. Accordingly in *Debeze* v. *Mann*(*p*) before stated,(*q*) the conversation of the two fathers upon the subject of the very contract between two persons under parental obligations to provide rationally for the interests of their children, is entitled to much more consideration than some others. The like observation applies to the case of *Ellison* v. *Cookson*,(*r*) before also stated,(*s*) the witness being an authorized agent in the treaty, and deposing to declarations between himself and the principal in settling the terms of the marriage contract.(*t*)

Upon the whole the law may be considered to be thus settled: First, that declarations made by the testator to any person, whether concerned in the business of the advance or not, are admissible in evidence. Secondly, that declarations of the testator, *at the time* of his making and settling the advancement, are of more consequence that his expressions *afterwards*; since the former are reasonably to be presumed as truly explanatory of what was his real intention at the time of pronouncing them, in regard to the transaction in a course of immediate execution; and that, therefore, if it be by any medium of proof sufficiently ascertained what the actual intention was at the time of advancement, it is immaterial what, for any particular reason, the donor may have thought proper at a subsequent period to declare his intention to have been.(*u*) And thirdly, that declarations *after* the advance and settlement of what the testator *had* done, are entitled to more credit than those made *previously* to the transaction, as to what he *intended* to do; for that intention may have been changed in the interval, or, as in *Trimmer* v. *Bayne*,(*x*)

(*p*) 2 Bro. C. C. 165. (*q*) *Supra*, p. 277. (*r*) 1 Ves. jun. 100.
(*s*) *Supra*, p. 279. (*t*) See 7 Ves. 272.
(*u*) 17 Ves. 453. 2 Meriv. 23. (*x*) *Supra*, p. 281.

they may have been made with a view of misrepresenting what the testator meant to do, and what his actual intentions were in relation to the advance. Hence, in the case last named, the declarations of the testator, made three months before the advancement, were not allowed to counteract the effect of that act, *viz.* the presumed ademption; and in *Langham* v. *Sandford*,(*y*) little importance was attached to what the testator declared *after* the date of his will.

CHAPTER VII.

General Legacies and their Abatement. The Equity of Legatees to follow the Assets. And the Refunding of Legacies.

SECT. I. Of the abatement of General Legacies.

1.—*What legacies to abate.*
2.—Heir's *liability in respect of lapsed interests in lands accruing to him.*
3.—*As to claims of particular general legatees to a priority of payment to others, so as to be exempt from abating; considering—*
1.—*Legacies given as mere* bounties.
2.—*Effect of a testator's declarations; and of his intentions otherwise shown to give a preference; and*
3.—*When a legacy is founded upon a* valuable *consideration.*
4.—*Of the abatement of general legacies of stock.*

SECT. II. Rights of Legatees to follow the assets when disposed of by the executor and the produce wasted.

1.—*Power of executors to sell and pledge* the estate.
2.—*Exceptions to that power; and,*
3.—*Effect of acquiescence upon the right of legatees to follow the assets.*

SECT. III. Of the refunding of Legacies.

1.—*At the suit of executors.*
2.—*At the suit of creditors; and,*
3.—*At the suit of unsatisfied legatees.*
4.—*As to* interest *payable on the sum refunded.*

CONNECTED with the *ademption* of general legacies (the subject treated of in the last chapter) is the abatement of them. The one is the performance of the bequest by the testator himself, instead of leaving it to be executed by his executors; and the other is occasioned by a deficiency in the assets to pay all the testator's obligations and testamentary dispositions. The abatement of specific legacies has already been discussed,(*a*) and what remains further to be considered under the head of contribution is:

(*y*) 17 Ves. 435. 2 Meriv. 23. (*a*) Chap. V.

Sect. I. The Abatement of Legacies that are general.

1. With respect to the arrangement among the legatees.

While any of the assets *not* specifically bequeathed remain, such as *are* specifically bequeathed are not to be applied in payment of debts, although to the complete disappointment of the general legacies; and specific legacies and legacies *in their nature* specific, *i. e.* specific in consequence of the appropriation of a fund by the testator for their payment, will not be under the necessity of abating with the general legacies for the reasons mentioned in preceding parts of this treatise.(*b*) But if the fund provided for the discharge of the legacies in their nature specific fail, or be deficient, they are nevertheless so far *general* legacies as to entitle the persons to whom they are given to call upon the general legatees proportionally to contribute towards the loss or deficiency, as was shown in the fifth chapter, for the rule is general, that if the assets prove insufficient to pay all the debts and legacies, the general legatees must abate proportionally *inter se*, and not only in respect of debts, but in payment of *costs*, when a suit has been instituted.(*c*)

But a residuary legatee has no right to call upon particular legatees to abate. The whole personal estate not specifically bequeathed, must be exhausted before those legatees can be obliged to contribute any thing out of their bequests. The principle is this, that the testator only intended for the residuary legatee that, which (if any thing) should remain after all the trusts of the will were performed.

It is to be remarked, that Lord *Cowper*, in *Dyose* v. *Dyose*,(*d*) made a decree contradictory to the above observations. In that case the testator was possessed of 20,000*l.* which consisted of a few items, *viz. East India* stock, *bank* stock, and money in the funds; and he gave 3000*l.* a piece to his two youngest sons, and the surplus to his eldest son, appointing his wife executrix, who married *B.*; *B.* wasted the estate and went abroad; and there being a deficiency of assets from that cause, the question was, whether the eldest son was entitled to any thing until all the debts and legacies were paid? for if he were, then his brothers would be obliged to abate proportionally with him. And Lord *Cowper*, C. was of opinion that the son was to be considered a legatee for the value of what would have been the surplus, after payment of the debts and legacies, if there had been no waste of assets, upon the ground of the testator's knowledge of the amount of his property when he made his will, inferred from the few particulars of which it consisted, and of his presumed intention to give the residue as a particular bequest to the son.

The principle and authority, however, of the last case was, with great propriety, questioned by Lord *Thurlow* in *Fonnereau* v. *Poyntz*,(*e*) who expressed himself to the following effect:

"As to the case of *Dyose* v. *Dyose*, there was no ambiguity, either latent and patent; there was a legacy of 3000*l.* a piece given to the youngest sons, the residue to the eldest, and the question was, whether the residuary legatee should have any thing or nothing; which, if not mixed with the affair of the executrix having wasted the assets of the testator, is a simple question, whether a testator

(*b*) Chap. III. and V. (*c*) *Barton* v. *Cooke*, 5 Ves. 464. also see 4 Bro. C.C. 350.
(*d*) 1 P. Will. 305. (*e*) 1 Bro. C. C. 478. see also Pre. Ch. 401.

giving a larger legacy than he is worth, and the residue to another, there could be a residue? I cannot agree to the law of that case, for in such an instance, if the testator did not leave a residue beyond the value of the legacies, the residuary legatee takes nothing. So where the pecuniary legatees abate *inter se* the residuary legatee takes nothing; and the law of the Court is, that the intention of a testator in making a specific bequest, or giving a pecuniary legacy, cannot be controlled by the statement of his fortune."(*f*)

2. A question may arise between the heir or devisee of real estate and legatees, as to the obligation of the latter to abate where the lands are liable to the legacies, some of which happen to lapse by the deaths of legatees, or are void by being given to charitable uses, and the estate is sufficient to pay all the legacies that are subsisting and well given, but deficient, if the heir or devisee be entitled to so much of the lands, or their produce, as is of the value of the lapsed interests or of the void bequests. Upon the case of lapse, Lord *Eldon* expresed himself in thess words: "If a man devise his real estate in trust to pay to several persons 1000*l.* each, and any of them die during his life, in the event of a deficiency, the others must abate. But if the devise be in trust to pay his debts and legacies, and he give several legacies, and a legatee die, the fund (*i. e.* the whole real estate) is a trust for the benefit of all the other legatees, if necessary."(*g*) And upon the other case of *void* legacies (as when given to charities and payable out of land,) his Lordship considered that there was no difference between it and the former; and so he decided in the case of *Currie* v. *Pye*,(*h*) which was to the following effect:

A. devised her real and personal estates to trustees, upon trust to sell the real, and to pay her debts out of the proceeds from the sale, and of her personal property, and also to pay the annuity therein given, and all other annuities and legacies which she might give by codocil or memoranda written or signed by her, and the surplus of both funds was to be applied according to her appointment to be expressed in a similar manner. *A.* afterwards, by written memoranda, which were proved with the will, gave several legacies to charities, which, being void, the question was, whether the proportion of the fund, produced by the real estate that would have been applied in payment of the legacies to charity, had they been valid, should go to the heir or supply the deficiency of assets for the other legacies? And Lord *Eldon* determined in favor of the legatees, upon the principle, that *A.* having converted all her real and personal property into an *aggregate* fund (the whole liable to every legacy) had made the produce of her *real* estate, where it was not well disposed of, liable to all legacies, well given; as by the general law, personal estate, forming an interest in land, is liable to all legacies except those given to a charity.

A case may occur different from a charge of *particular* legacies upon the real estate, and form an *express* trust for its application in discharge of debts and legacies. As when the whole real property, after being charged with debts and legacies, is together with

(*f*) See further on this subject *ante*, p. 222. *et seq.*
(*g*) 17 Ves. 466. (*h*) Ibid. 462.

the personal estate, devised to *B.* and *C.* as tenants in common: if *B.* die before the testator, half of the real fund will lapse to the testator's *heir*, and half of the personal residue will result to the testator's *next of kin.* But in case of a deficiency of assets, a question arises, how the real estate is to be applied?

Attending to the interests of the heir, and *C.* the surviving residuary devisee, if the personal fund were more than sufficient to answer all the demands; what remained of it, after satisfaction of the debts and legacies, would belong to *C.* and the testator's next of kin, and the whole of the real estate would be divisible between the heir and *C.* But in the case supposed, of a deficiency of the personal fund, it is presumed, that the heir and *C.* must abate *pro rata;* for the charge upon the real estate of debts and legacies being general, and a trust in equity, and still subsisting notwithstanding the death of *B.;* the heir cannot be in a better situation than *B.* who must have contributed with *C.* proportionally, had he survived the testator. *B.* and *C.* could only have taken the surplus of the real estate, after the charges upon it were satisfied; and the substitution of the testator's heir in the place of *B.* cannot, it is conceived, impart to the heir any other interest or privilege than what *B.* would have been entitled to, had he been living.

3. We shall next consider the claims of some legatees to a preference in payment to others, so as to be exempt from abatement.

The following appears to be the tests by which all those claims are to be tried and determined.

First. Whether the legacy be general or specific, or in its nature specific? for, if it be of the latter kind, it is not liable to abate with general legacies. But,

Secondly. Suppose it to be a general legacy, then in order to ascertain the necessity of its abating with other general legacies, three points must be settled:

1. Whether the legacy be a mere *bounty*? And if so, then—

2. Whether the testator has shown from the contents of his will, a clear intention, (though not actually expressed in words) that the legacy should have a priority of payment to his other legacies? or if not—

3. Whether there be any valuable consideration for the testamentary gift?

The necessity of the above inquiries, appears from the consequences which may result from them; for if the legacy be a mere bounty, it must abate upon a deficiency of assets, and it is of no importance who are the the objects or what are the purposes to which it is given. But if the testator distinctly manifest, upon the face of his will, an intention that the legacy should be first satisfied, that intention will give it a preference, and an exemption from abating with the others. And so it will be, if there be a consideration for the bequest; for since the legacy is founded upon a basis wholly different from *voluntary* dispositions, it will be entitled to a precedency in payment to those bequests, and consequently, to the privilege of being exempt from contribution with them to pay debts. With a view to perspicuity, we shall consider the above subjects in their order.

FIRST. Whether the legacy be general or specific, or in its nature specific, is a question of great nicety; but as an attempt has been made in the third chapter, to show what bequests are general, and what specific, or in their nature specific, the reader is referred to that chapter. It will be sufficient in this place, to remind him that whether a legacy be specific, or in its nature only specific, it will not be made to abate with general legacies. Supposing then, in the SECOND place, that the legacy is general, we proceed to consider,

1. When the bequest operates as mere bounty.

It has occurred, that legacies merely voluntary and general, have notwithstanding the rule of abatement prevailing in the equitable administration of assets, been claimed in full, and the persons to whom they were given, have resisted a contribution with other general legatees in discharge of debts, when the assets were deficient to pay them and the legacies *in toto*, upon the principle either of a presumed intention of the testator to give them a preference of payment from their relation to him, or under particular circumstances from which they considered themselves to be more especial objects of his favour and predilection; or when a like inference was thought to arise from the purposes to which the legacies were directed to be applied. But it will appear in the sequel, that such legatees have generally failed in their claims; for, since they were mere volunteers, and the bequests general, a court of equity has said, there was no reason why they should be placed in a different situation from other general legatees.

In conformity with these observations, we find, that *servants* have insisted that general legacies given to them ought to be preferred to similar bequests made to other persons, and should, therefore, be privileged from abating such claims, however, have not been attended with success.

Thus, in The *Attorney General* v. *Robbins*,(*i*) legacies of 5*l.* a piece were given to the testator's servants; and although the executors had paid them in full, yet the assets being insufficient to answer all demands upon them, the Master of the Rolls refused to infringe upon the rule applying to abatement, viz. that these legacies being general and voluntary, should abate with the other general legatees; and the Court observed, that were it to break in upon the rule in this instance, it would be impossible to discover the point where to stop.

So also in *Alton* v. *Medlicot*,(*k*) General *Pepper* bequeathed to *A.* 140*l.* out of his personal estate to purchase an annuity for life, if she continued in his service, with a direction to his executor to advance a further sum if the former were insufficient for the purpose. Upon a deficiency of assets, Sir *Joseph Jekyll*. M. R. ordered that the annuity should abate upon the 140*l.*

That the objects of a legacy, where it is general and voluntary, will not give it a preference to the other legacies, appears from this circumstance; that bequests to *charities* are not privileged from abating with general legacies. The civil law gave a preference to pious and charitable dispositions over all others, but the law of *England* has not adopted that code in this instance. It considers such

(*i*) 2 P. Will. 25. (*k*) Cited 2 Ves. sen. 417. and see chap. III. sect. 4. subdiv. 2.

bequests in the same view as others, and not more particularly favoured than the rest; hence, whether a general legacy be left to a hospital or to poor relations, it must contribute and abate with other general legacies upon a deficiency of assets, as settled by the authorities referred to in the note.(*l*).

Executors have sometimes claimed legacies, given to them, in full, as not falling within the rule applicable to abatement on a deficiency of assets, either upon a presumed intention of testator's to give them a preference in respect of the office to which they were appointed, or as a compensation for their trouble in executing trusts of the will; whence they insisted an inference arose, that in consideration of such trouble the testators must have intended them a priority in payment to other general legatees, who had no duty to perform, for the testamentary benefits which they received. But a court of equity has disregarded such subtle reasoning, and required more substantial evidence or intention in order to place legatees in form and in substance general, in a better condition than other general legatees. Lord *Hardwicke*, in the case *Heron* v. *Heron*,(*m*) thus expressed his sentiments upon the present subject: "I am very unwilling to distinguish legacies given to execuotrs *for their care* and pains, from common legacies, because whether the words *care and pains* be expressed in the will or not is a circumstance entirely depending upon the whim of the drawer. The legacies are still bequests, and not more so than others, so that there ought not to be any distinction among them upon so slight a ground" and such was his Lordship's decision.

The principle of the last case equally applies to and requires the abatement of general legacies bequeathed to creditors, whose debts had been previously liquidated by composition at less than their real amounts, for those creditors are in no higher a situation than general and voluntary legatees.

This question was decided in the case of *Coppin* v. *Coppin*,(*n*) where *A.* after bequeathing several legacies, proceeded as follows: "Whatever shall remain in money, lands and goods I give to my brother *B.*, who is to pay thereout what I owe to my creditors at *Aleppo*, who have been so kind as to compound my debts with me at 10*s.* in the pound; and they are to be paid without interest." *A.* then appointed *B.* executor. There having been a deficiency of assets, the composition creditors claimed a preference in payment of their legacies to the others, upon a suggestion that their demands being originally *debts* which the testator thought he was bound in conscience wholly to discharge, they continued moral obligations, though released in law, and were therefore of a superior nature to mere legacies, and ought to be preferred. But the Court conceived that the compounded creditors having once released their debts, which became extinct, they were not in the situation of creditors, but of voluntary legatees, and had no title to the legacies, except purely under the will; and that it would be dangerous to make a construction be-

(*l*) *Tate* v. *Austin*, *Masters* v. *Masters*, *Att. Gen.* v. *Hudson*, 1 P. Will. 265. 422. 674. also the Bishop of *Peterborough* v. *Mortlock*, 1 Bro. C. C. 566.

(*m*) 2 Atk. 171. and see *Att. Gen.* v. *Robins*, 2 P. Will. 25. *Fretwell* v. *Stacy* 2 Vern. 434.

(*n*) 2 P. Will. 292. 296.

yond the words of the instrument, the effect of which would be to make a new will for the testator.

The reasons of the last decision apply to cases where a testator bequeaths money to pay the debts of a relation or friend, because there was no obligation upon him to make such a bequest. The legacy, therefore, is clearly a bounty, and to be considered merely voluntary; consequently, it is no better condition than other general legacies, and must abate with them upon a deficiency of assets.(*o*)

There is no distinction between a legatee and an *annuitant* in regard to the general rule of abatement, for the bequest of an annuity out of or charged upon the general personal estate is not specific, as has been shown in the third chapter of this Treatise, from the authorities there produced; it, therefore, is not privileged from abating with the other legacies. And since the mere circumstance of the bequest being of an annuity raises no *inference* of an intention that the testator meant it a precedency in payment, the annuitant is even destitute of that ground upon which he might claim an exemption.

Thus in *Hume* v. *Edwards*,(*p*) it was a question, in consequence of a deficiency of assets, whether a devisee for life of an annuity charged upon the personal estate should abate in proportion with the other legatees? And Lord *Hardwicke* determined in the affirmative.

Such being the rule when an annuity is given directly out of the personal estate, because it amounts to no more than a general bequest of so much money out of that fund, as will yearly produce the annuity, it follows, that if the bequest be of a sum of money to purchase an annuity, or to lay out in buying land, or to invest upon government securities for the benefit of the legatee, either in paying to him the rents and interest, or otherwise to dispose of the subjects according to his appointment, or to transfer them to him at a particular time; in each of those cases, if there be a failure of assets, those sums must abate; since they are no more than voluntary dispositions, and fall within the class of general legacies.

Accordingly in *Hinton* v. *Pinke*,(*q*) *A.*, among other legacies, gave 1500*l.* to *B.* her eldest son, in trust to lay it out in the purchase of lands of inheritance, and to grant a rent-charge of 50*l.* a year out of it to her daughter *C.* for her separate use; but if *B.* refused to make the purchase and grant the rent-charge, he was to have 500*l.* only of the money, and the remainder,(1000*l.*) was to be laid out in buying an annuity for *C.'s* separate use. There being a deficiency of assets, the question was, whether the legacy of 1500*l.*, or at least the 50*l.* annuity should abate with the general legacies? And it was objected against any abatement that the legacy was to be considered as a devise of *land*, and therefore specific. To which it was answered, that the bequest was of *money* only, and liable consequently to abate with other general legacies. And of that opinion was Lord *Parker*, C. since the money was not given in the form of a specific legacy; his Lordship observed, that from the provision in the will for the son's refusal or neglect to make the purchase and grant, he considered the daughter to be a legatee for 1000*l.* which must abate,

(*o*) See *Shirt* v. *Westby*, 16 Ves. 393. 396.
(*p*) 3 Atk. 693. (*q*) 1 P. Will. 539.

and the residue be laid out in the purchase of annuity for her. Again—

In *Lawson* v. *Stitch*,(*r*) the bequest was of 500*l.* to *A.* to continue at interest upon such securities as the testator left at his death, or to be invested on government securities at the election of his executors. The assets proving deficient to pay all the legacies, Lord *Hardwicke* determined that the legacy was general, and liable to abate in proportion with the other legatees.

The cases which have been cited, show that when the bequest is made in the form of a general legacy and is pure bounty, and there are no expressions in, or inference to be drawn from the will, manifesting an intent to give it a priority, the objects or purposes to which the legacy is to be applied will not exempt it from abatement; for a court of equity will not speculate upon what a testator *might* mean, as to preferring a legacy on account of the object or purpose to which it was given, when in form it is merely general; since, if the Court were to do so, it might not only be making a new will for the testator, but be opening widely its doors to litigants, and the line could not be easily drawn at which the Court might say, "hitherto and no farther shall the rule of abatement be broken in upon." It may, therefore, be concluded, that general and voluntary bequests for the maintenance, or for the advancement in the world of the legatees, or for any other purposes of bounty, must abate with other general legacies.

In addition to the cases before produced, may be cited the authority of *Apreece* v. *Apreece*,(*s*) in support of the above remarks. In that case general legacies were left for the *purchase of mourning rings;* and although a priority of payment was insisted upon by the legatees, a claim which, if allowed, would have privileged them from abating, with the others, yet it was determined that these bequests (being general) should contribute with others of a similar denomination.

The last case seems to be a further authority, that legacies given for mourning are within the rule applicable to abatement.

If a general legacy for mourning or to purchase mourning rings be under the necessity of abating, being considered as no other then a general legacy, it should seem that a similar form of bequest for building a monument to the memory of a relation would not be placed in a better situation. But in *Masters* v. *Masters*,(*t*) Lord *Parker*, C. exempted such a legacy from abating with the general legacies. The monument was for the testatrix's mother, and the amount of the legacy was 200*l.* The bequest was insisted to be a debt of piety to the mother's memory, and therefore entitled to a preference to other general legacies, yet how to distinguish this debt of piety from a debt of charity, or a debt of friendship or remembrance, is not an easy task, a circumstance which proves the wisdom of the rule acted upon by a court of equity in requiring express declaration of priority to a legatee, or clear intention to give it, appearing from the context of the will, in order to exempt such legatee from abating with the others. Lord *Parker's* decision may, there-

(*r*) 1 Atk. 507. and see *Gibbons* v. *Hills*, 1 Dick. 324. *S. P.* and stated *ante*, p. 156. (*s*) 1 Ves. & Bea. 364. (*t*) 1 P. Will. 423.

fore, be reasonably questioned. And if a monument had been erected to the mother's memory, and the testatrix had left the money to ornament or to keep it in repair, the legacy must have abated upon the authority of *Blackshaw* v. *Rogers*.(*u*) It is difficult to support Lord *Parker's* decree on the basis of a debt of piety, since that consideration may be applied to each case; and then his Lordship's opinion is over-ruled by Lord *Thurlow* in the authority last referred to. Upon the whole, it is presumed, that a general legacy to erect a monument for a parent, child, or friend, would not now be excepted out of the general rule of abatement.

It appears from the preceding cases and observations, that a court of equity will not make a difference among general legatees, and exempt some of them from the operation of the rule of abatement, upon slight inferences or conjectures that the testator intended to give their legacies a priority of payment, when such intention can alone be inferred from the relation of the legatees to him, or from the purposes to which the bequests are applicable. But it may be proper to consider more particularly whether the relationship of husband and wife, or parent and child, entitles those sustaining such intimate relationships to a preference in payment of their general legacies, over other general legatees. They have claimed such a priority upon the basis of intention, presumed from the close connection subsisting between them and the testator. In the case of *Lewin* v. *Lewin*,(*x*) though not a decision that a wife or child is in general entitled to such preference in payment, yet Lord *Hardwicke* expressed himself in terms, which could not be otherwise understood than as his sentiments in favour of the general right. Nevertheless, within ten days afterwards, his Lordship in a case of *Blower* v. *Morret*,(*y*) seems to have changed his opinion in declaring, that a claim of a general legatee (a wife in that instance) to a priority of payment to other general legatees, must be founded upon *very strong expressions in the will*;(*z*) thus intimating that inferences of intention drawn from circumstances, such as the relation of parent and child, or husband and wife, are not of themselves sufficient to form those cases into exceptions to the rule observed in regard to abatement in the administration of assets; exceptions which the Court has seldom allowed. It cannot be denied that on first impression, it appears to be a natural inference, that a husband or parent should intend to give a preference in payment to a general legacy bequeathed to his wife or child, upon which intent alone it must be that such priority can be claimed. Yet upon reflection, the impression and inference first made lose much of their weight, when it is considered that the testator has not expressly declared that priority, but given the legacy in the same form of generality as his other legacies; and further, that it is not only possible, but probable, that so far from meaning any preference in payment to any of them, he intended and thought that all the legacies he had bequeathed would be fully satisfied; indeed the very bequests are evidence of his conception and belief that his personal estate was sufficient to answer all his testamentary dispositions.(*a*) The testator's intention, therefore, to prefer the legacy to his wife

(*u*) Cited 4 Bro. C. C. 349. and stated *infra*. (*x*) 2 Ves. sen. 416.
(*y*) Ibid. 420. (*z*) Ibid. 421. (*a*) 4 Mad. 168.

or child (that intent being the very foundation upon which the claim rests) seems to be even below doubt; for it is probable there was a total absence of intenton upon the subject.

On the whole, it would seem that when a legacy to a wife or child is general, the rule of abatement applicable to other general legacies equally applies to it, and can only be evaded by strong expressions in the will, or manifest intention collected from its contents; so that if there be neither expressions in the instrument, nor intention apparent upon the face of it, that such legacy should have precedence, it must abate with the general legacies, with regard to the circumstance whether the wife or child have any other provision or not. The principle is, that the legacy being general like the rest, there is no solid reason in the absence of declaration, or intention appearing upon the will, why that legacy should not be exposed to the same disadvantage as the other legacies.(*b*)

But since a testator may by express declarations, or clear intention, shown in his will, prefer one class of general legatees to another, so as to exempt the bequests, falling within that class, from abating with the rest, we shall proceed to consider—

2. What will and what will not be sufficient expression, and what sufficient evidence (in the absence of express declaration) of the testator's intention to prefer in payment one legacy to another.

It is but seldom that claims by general legatees of a priority of satisfaction, so as not to abate proportionally with others, have been brought before a court of equity. There are not, therefore, many cases upon the subject; yet from the authorities which have been and will be produced, it appears how rarely the Court has acceded to those demands, and for the reason before stated, viz. that if it were upon slight grounds or conjecture to give a preference to a general legatee, there would be no end to applications upon the subject. The Court, therefore (when the testator's express declarations are relied on) requires them to be clear and explicit, in order to give any individual general legacy a preference over other general bequests.

Thus in *Marsh* v. *Evans*,(*c*) there were words declaratory of a preference in payment of a legacy given to a daughter. The only question was upon the construction of the words in reference to the event which had occasioned a necessity for abatement by the legatees. The case was to the following effect: *A.* bequeathed 2000*l.* a piece to his two sons, and 2000*l.* to his daughter, payable at twenty-one or marriage; with a *proviso*, that if the assets should fall short for the satisfaction of those legacies, his daughter should notwithstanding, be paid her full legacy, and the abatement be borne proportionally by the legacies of the sons only. The testator left sufficient property to discharge all the legacies, but the widow and executrix wasted the assets, which was the sole cause of the deficiency. And Lord *Parker*, C. on appeal from a decere at the *Rolls*, determined in reversal of that decree, that according to the words and meaning of the will, the daughter should have her full portion, and the abatement be only made out of the legacies to the

(*b*) See Lord *Hardwicke's* judgment in *Blower* v. *Morret*, 2 Ves. 421.
(*c*) 1 P. Will. 668. (*d*) 1 P. Will. 669.

sons; and for these reasons, *viz.* that there was a plain preference given to the portion of the daughter before those of the sons, and that the event which had happened was within the words of the proviso, the estate having actually fallen short to pay the legacies; also since the testator had not restrained the expressions to any particular means by which the assets should fall short, the construction of them was to be general, *i. e. if by any means* there should be a deficiency, because the injury was the same to the daughter, whom the father seemed in all events to have provided for with a portion of 2000*l.*

It seems to follow from those reasons, that if the assets had become deficient after the testator's death, by losses from fire, or by a defect of title to a security, upon which part of the estate had been lent (events which could not have been foreseen by the testator) those accidents would have been included within the provision of the will, and the daughter entitled to her full portion.(*d*)

If, however, the expressions be ambiguous, and do not mark with certainty the testator's intention to give a priority to a legatee, the rule of abatement is so much regarded, that the Court will not permit it to be infringed by such an uncertainty.

Suppose, then, a testator give to his wife a general legacy of 500*l.* with a direction to pay it *immediately* after his death, out of the *first* monies that should be received by his executors; neither the order for payment of the legacy immediately after the testator's decease, nor the direction of its satisfaction out of the first monies which should come to the hands of his executors, would be a sufficiently clear manifestation of his intention, that he meant to give this legacy a precedency in payment to his other bequests; and for these reasons: the testator, in directing the legacy to be paid immediately after his death, might merely intend to anticipate the legal period of payment, which is at the expiration of one year after his decease, and not to give the legacy a priority to his other general legacies; and then the proviso for payment of it out of the *first* money to be received after his death, is consequential to that preceding direction, and of no operation. Hence it appears, that the testator has not so clearly expressed his intention to give a preference to the legacy, as, in this instance, to authorize a court of equity to relax its rule of abating, founded upon the justice of an equal contribution, by all the general legatees.(*e*)

And for the reason last mentioned, if a legacy be given to *A.* payable *one month* after the testator's death, a second legacy to *B. six months* after the testator's death, and a third legacy to *C.* payable *twelve months* after the testator's decease, the difference in times of payment will not impart to any of the legatees such a preference as to exempt them from abating upon a deficiency of assets; because the preference being confined to payment only, is consistent with the intent imputable to all testators, that their several dispositions should be wholly satisfied, upon which presumed intention it is, that the rule of contribution is founded. The intent, then, in the present case, to exempt any of the legacies from the operation of that

(*d*) 1 P. Will. 669. (*e*) *Blower* v. *Morret*, 2 Ves. sen. 420.

rule, merely upon the ground of the different periods appointed for their payment, is, at the utmost, conjectural and ambiguous, and consequently insufficient to impart that privilege.(*f*)

So also, if a testator expressed himself in the following manner: "Imprimus," or "in the first place."(*g*) I give such a legacy to *A.* and "in the next place," or "afterwards," I give such a sum of money to *B.*; these words or variety of expression (considering the inattention and incorrectness with which wills are frequently drawn, as also the little regard paid to nicety of expression) will neither give *A.* a preference to *B.* nor either of them a priority to other general legatees, so as to exempt them from the obligation of abating with such other legatees. The reason is, that the words merely point out the *order* in which the bequests are made in succession, and do not impart with certainty an intention to prefer one to another. The expressions before noticed are not necessarily inconsistent with the application of the general rule of abatement which is founded upon equality, but they may be satisfied with a construction compatible with the admission of that rule. The *possible* intent of the testator to give a preference by the language he adopted, is judicially insufficient to accomplish a purpose so obscurely or doubtfully intimated.

All the above expressions occurred in the recent case of *Beeston* v. *Both*,(*h*) in which the testator gave his personal estate to executors, in the first place, to pay debts, funeral and testamentary expenses; and in the next place, three legacies to *B.*, *C.* and *D.* with legal interest from three months after his death, and afterwards to raise and set apart three sums of money to be applied as therein mentioned. Upon a question of abatement, the Court declared, upon the principle before stated, that none of the legacies were entitled to a priority of payment, and therefore that all of them must abate proportionally, according to the general rule.

Having considered certain *expressions* as not sufficiently indicating a testator's intention to exempt one general legatee from abatement in preference to another, we shall next produce some instances where the *contents* of the will were held to afford the requisite *evidence* of that intention.

Since every testator is presumed to mean, that all the legacies given by him shall be paid, it follows that if there be a deficiency of assets to fulfil the intent, it is only equitable that all of them should bear the loss in proportion to their bequests; and such is the rule as before stated. To form exceptions to a rule so founded, the testator's intention as collected from his will, in the absence of appropriate expression must be clear, as appears from the cases before mentioned and referred to. An instance of the manifestation of such an intention may be, where a testator, in disposing of his personal estate, constitutes two residues, and computes the first after taking out of it one or more legacies, and computes the second, after deducting other legacies. In such a case, it has been determined, that the intention was sufficiently apparent to give the first set of lega-

(*f*) 2 Ves. sen. 421. 4 Mad. 168.
(*g*) *Brown* v. *Allen*, 1 Vern. 31. *Lewin* v. *Lewin*, 2 Ves. sen. 417. and *Blower* v. *Morret*, ibid. 421.
(*h*) 4 Mad. 161.

tees a preference in payment to the second, so as to privilege the former from abating with the latter.

The case of *Lewin* v. *Lewin*,(*i*) will prove and illustrate the above remarks. *A.* having a wife and two children, bequeathed to her for life an annuity of 120*l.* subject to limitations over, if he had a son, &c. And he afterwards directed his executors to buy, if they could, the annuity in government securities of ninety-nine years, or some other long term, but if they were unable to do so, then to purchase lands of the annual value of 200*l.* to be so settled that the annuity should be to his wife, free from taxes, with remainders over. *A.* also directed that if he left any child, his executors should out of the profits of his *residuary* estate pay to his wife 30*l.* a year for the maintenance of such child. He then gave legacies to some collatral relations and friends, and ordered *all the residue* of his real and personal estates to be placed out for the benefit of his children, and to be paid to them at their respective ages of twenty-one or marriage. There being a deficiency of assets, the question was, whether the wife's annuity of 120*l.* should abate with the other general legacies? And Lord *Hardwicke* determined in the negative, expressly stating in the subsequent case of *Blower* v. *Morret*,(*k*) the governing reason for his decree in the present, to be "that the testator had constituted two residues of his estate;" and his Lordship observed in his judgment in *Lewin* v. *Lewin*,(*l*) that it would be an unreasonable construction, and contrary to the intent to presume the testator meant the whole maintenance for his children should depend upon the contingency, whether there would be any surplus after the purchase of the annuity, (the whole of which was to go to the wife for life), and after all the general legacies that he had given to collateral relations and friends.

That the last observations, connected with the manner in which the two sets of legacies are bequeathed, afford additional corroborative evidence of the testator's intention to give a preference of payment to the first class is obvious. But had the annuity been bequeathed and classed with the other legacies without any mark of discrimination, then it should seem, for the reason, detailed in a preceding page,(*m*) that although its object were a provision for a wife, it would not have been exempted from abatement with the other general legacies.

Another instance of intention sufficiently manifest to prefer one class of legatees to another may be, when a testator, after bequeathing several legacies, states his supposition of there being still a residue of his estate, and then proceeds upon that idea to give more legacies either in his will or by a codicil; in such a case if the assets be deficient to satisfy all the bequests the second set of legatees alone must contribute to supply the deficiency, for they are not entitled to call upon the others to join in the abatement, and upon the principle of the testator's intent being clear to give the second class of legacies only if there remained a sufficient fund for their payment, after satisfaction of those first bequeathed.

A question of this kind occurred in the *Attorney General* v.

(*i*) 2 Ves. sen. 415. (*k*) 2 Ves. sen. 421. (*l*) Ibid. 417.
(*m*) *Ante*, p. 291.

Robins,(*n*) in which the testator after giving several legacies mentioned towards the conclusion of his will, that he apprehended there would be a considerable surplus of his personal estate beyond what he had before disposed of in legacies; for which reason he gave several others. After this he gave further legacies in a codicil amounting to 160*l.* which, upon a deficiency of assets as the event happened, were to be paid out of 200*l.* given by the will to charitable purposes. The *Master of the Rolls* determined that the legacies given at the latter end of the will being upon a presumption that there would be a surplus, but founded in a mistake, should be postponed to those previously bequeathed. And in regard to the legacies in the *codicil*, the Court observed, that as a codicil is part of the will, bequests in both should proportionally abate; but that in the present case, when the testator in the latter part of his will said, that, since he apprehended there would be a considerable surplus, he gave additional legacies, the same apprehension must be intended to continue when he made the codicil; and the legacies in it should take place *only* out of the supposed surplus, were it not for the latter part of the codicil in the present case, directing, in case of a deficiency of assets, the legacies it contained should be paid out of the 200*l.* given by the *will* for charitable purposes, a legacy which, in the event that happened, could not take effect to its full extent. Hence it appeared that by the *reference* to the will, and a *substitution* of the legacies in the codicil for part of one in the first class bequeathed by such will, in the event of a want of assets to pay in full the benefits given by the codicil, the testator's meaning was sufficiently evinced, that both these sets of legacies, *viz.* those of the first class in the will, and those in the codicil should be equally paid; and, consequently, that all of them should abate in proportion. Again—

In the case of *Beeston* v. *Booth*,(*o*) the testator, after giving two sets of legacies, directed that after payment of those bequests and of his debts, his executors and trustees should be possessed of his *residuary estate*, if not exceeding 1000*l.* in trust for *B.*; but if it were more, and not beyond 1500*l.*, in trust for *B.* and *C.*; and that if such residue exceeded 1500*l.*, then in trust to pay the further legacies therein given (specifying their amounts); and the surplus, if any, to *D.*, with a direction, that if the residue were insufficient to pay those legacies, the persons to whom they were bequeathed should proportionally abate. Upon a considerable deficiency of assets, one of the questions was, whether the abatement should be general, as well by the two sets of legacies given before the disposition of the residue, as by the third set bequeathed in distributing such estate? And the Court determined that the two first classes of legatees were entitled to a preference of payment to the third class; and consequently, that the latter could claim nothing, unless there remained a surplus after fully satisfying the testator's debts, and the two first sets of legacies; as the intention was clear, that the third class was to be payable only in the event of there being a surplus, as before described.

The last point to be considered, in determining whether a general

(*n*) 2 P. Will. 23. (*o*) 4 Mad. 162. 170.

legacy is entitled to a preference in payment, so as to be privileged from abating with other legatees as previously observed,(*p*)—is,

3. Whether there be any valuable consideration for the testamentary gift.

When a general legacy is given in consideration of a debt owing to the legatee, or of his relinquishing any right or interest, since the bequest is not made as a bounty, like other general bequests, but as purchase money for the collateral right or interest, it will be entitled to a preference of payment to the other general legacies, which are merely voluntary.

Suppose, then, a sum of money to be bequeathed to *B.* in the event of his conveying a particular estate to *C.*; *B.* has an option of acceding to the terms, and if he do so, the transaction amounts to a *contract* for a valuable consideration, and the legatee will not be under the necessity of abating proportionally with other general legatees.(*q*) The law is the same when a general bequest is made by the testator to his wife in lieu of dower; for her election to accept the legacy places her in the situation of a purchaser of what is given her by the will.

The case of *Burridge* v. *Bradyl*(*r*) was decided upon the above principle.(*s*) There, amongst other legacies, the husband bequeathed 3400*l.* to his executors to purchase exchequer bills for ninety-nine years, to be enjoyed by his wife for life, "she releasing her dower." Lord *Cowper* said, that the 3400*l.* should be preferred to the other legacies, which must be lost if the assets were insufficient to pay them.

So in *Blower* v. *Morret*,(*t*) the husband made some testamentary gifts to his wife and other persons, and after giving a general legacy of 500*l.* to her, declared that the bequests made in her favour were in lieu and satisfaction of all dower and thirds, to which she might be entitled at law out of his real and personal estates. Lord *Hardwicke* declared, that the wife's abandonment of her legal rights would entitle her to payment of the whole of the benefits which were given to her under the will, in preference to other general legatees.

It must be remarked, that as it is the surrender of existing rights or claims, which gives the preference to the legatee; it is necessary that those rights or claims should be subsisting at the testator's death; for example, suppose a wife, were barred of dower and thirds by a jointure, Lord *Hardwicke* said, he would not consider the wife to be a purchaser of the testamentary provisions, but that the words requiring a release of such rights were only of course, and amounted to nothing.(*u*)

If, however, the wife be entitled to dower and thirds, and a legacy be given to her in satisfaction of them, it will not be excluded from a preference in payment to other legacies, if the amount of the bequest happen to exceed the value of those rights; for the testator is the only and best judge of the price at which he is desirous to become the purchaser of them.

Accordingly in *Davinhill* v. *Fletcher*,(*x*) *A.* bequeathed an annuity

(*p*) *Ante*, p. 286. (*q*) 2 Ves. sen. 422. (*r*) 1 P. Will. 127.
(*s*) 2 Ves. sen. 422. (*t*) 2 Ves. sen. 420. (*u*) Ibid. 422.
(*x*) Ambl. 244. and see 2 Ves. sen. 422. *Heath* v. *Dendy*, 1 Russ. 543.

to his wife for life, to be paid out of a freehold estate; also the use of his house, with the furniture and linen. He further gave to her 500*l.*, which, with the annuity, he declared to be "in full of what she should or might claim for dower and thirds out of his real or personal estate." There was a deficiency of assets to pay debts and legacies, and the question was, whether the 500*l.* should abate with the other legacies. For the abatement two arguments were used:—1st, that the words, *in full of dower*, &c. were not inserted to give the wife an advantage, but merely to signify that she should not have both dower and the legacies, and that since the 500*l.* would abate without those expressions, so ought that sum to do with them:—2dly, that the legacies exceeded the wife's dower, and therefore the 500*l.* ought to abate. To these arguments Sir. *Thomas Clarke*, M. R. answered, that although there was weight in the observations, which would deserve consideration, if the point were *res integris;* yet, as the law had been settled to the contrary by the two cases of *Burridge* v. *Bradyl*, and *Blower* v. *Morret*,(*y*) his Honour declared, that the wife was entitled to the legacy without abatement.

We now come to the last subject proposed for consideration in this section, namely,—

4. The abatement of general legacies of *stock*.

In cases where stock is bequeathed as a general legacy, and the legatee is called upon to abate with other general legatees, the abatement will be regulated by the value of stock at the end of one year next after the testator's death. An instance of this occurred in—

Blackshaw v. *Rogers*(*z*) in which a testator gave 200*l.* consols to *B.* to keep a monument in repair; and, by a codicil, he gave the interest of 300*l.* to *C.* for life. The assets being deficient, Lord *Thurlow* decreed that *B.* and *C.* should abate in proportion, and he directed the master to inquire into the value of the stock at the end of a year after the death of the testator.

Having in the preceding section discussed the rule of abatement as applicable to general legatees, when a deficiency of assets occurs; the subject which next presents itself for consideration is,—

Sect. II. The rights of general legatees to follow specific assets in the possession of a stranger; when they have been pledged or disposed of by the executor, and the produce *wasted*.

It is a general rule of law and of equity, that an executor may dispose of his testator's assets; over which he has an absolute power and that they cannot be followed by creditors, much less by legatees, into the hands of the alienee. The principle is necessity, arising from the office to which the executor is appointed, *i. e.* to perform the will in paying debts, &c. duties which he could not carry into execution, if persons dealing with him in the disposition of the estate were not protected from an after reckoning at the instance of creditors and legatees.(*a*) Hence it follows, that if the act of the executor be consistent with his character and duty as such, it cannot

(*y*) 1 P. Will. 125. 2 Ves. sen. 420. stated *supra*, p. 297.
(*z*) Cited by the *Master of the Rolls* in *Simmons* v. *Vallance*, 4 Bro. C. C. 349. and see *Keylinge's* case, 1 Eq. Ca. Abr. 239. pl. 25. stated *infra*.
(*a*) *Whale* v. *Booth*, 4 Term Rep. 625. *in notis*. *Farr* v. *Newman*, ibid 630.

be impeached; for when he sells any of the assets, the law presumes the disposition to have been made to answer the purposes, for which he was invested with the power of sale; and in so doing, the executor performs that act which is necessary to his authority, and therefore lawful, just, and right. Such is the general rule of law and equity upon this subject. But neither jurisdiction will permit the rule to be abused, so as to protect a disposition founded in fraud, or a transaction amounting to a breach of trust concerted between the executor and his vendee. Yet the latter is not obliged to ascertain whether in the particular instance the executor is discreetly exercising his power. It is sufficient, if the purchaser be not privy to a breach of trust, nor engage in a transaction with the executor which is in its *nature* incompatible with a legitimate administration of the testator's estate. In order to exemply the above remarks, it is proposed to consider—

1. Some of the transactions of an executor which have been supported under his general power to dispose of the testator's personal estate.

Since an executor is legally authorized to dispose of the assets, the person dealing with him for their purchase, does so upon the credit of that authority, so that if the purchaser have merely notice of the will, or of its contents, or that he is dealing with an executor, none of those circumstances *alone* will enable creditors or legatees to defeat the transaction. The personal fund in the possession of the executor being liable to debts, the purchaser has a right to assume, that the sale made by the executor is necessary and proper. He is not obliged to inquire and inform himself whether all the debts have been paid; and although that may have been the case, yet, if it were unknown to the purchaser, the general power and dominion of the executor over the assets will protect the sale and purchase; so that whether the subject disposed of, be part of the general estate, or chattels specifically bequeathed, neither the general nor specific legatees can deprive the purchaser of the benefit of his contract.

Thus in *Humble* v. *Bill*,(*b*) the first material case upon the subject, the testator, having a term of twenty-one years in a printing office, directed 2000*l*. to be raised out of the profits for his daughter and her children. The executor mortgaged the term to *B.*, who assigned it to *C*. And the Court of Chancery determined upon the general power of an executor to dispose of the assets, that *C*. was entitled to the benefit of the mortgage. Although this decree was reversed by the House of Lords,(*c*) the propriety of such reversal has been dissented from by succeeding Judges; viz. Sir *Joseph Jekyll* in *Ewer* v. *Corbet*,(*d*) and by Lord *Alvanley* in *Andrew* v. *Wrigley*,(*e*) who said, he should hardly have assented to the reversal of the decree, the cause of which he ascribed to the particular circumstances of the case, and not as having any allusion to the usual instance of an executor mortgaging the property of his testator, which might or might not be for the purposes of the will. His Honour also made a farther and a very material observation: that when the decree was

(*b*) 2 Vern. 444. 1 Eq. Ca. Abr. 358. pl. 4. *S. C.*
(*c*) 3 Bro. Parl. Ca. 5. 8vo. ed. (*d*) 2 P. Will. 149. (*e*) 4 Bro. C. C. 137.

set aside, there was *no lawyer* in the House of Lords unless *perhaps* Lord *Somers*. Since that case, however, the power of an executor, when there are debts, to dispose of the assets whether specifically bequeathed or not, so as to impart a good title to a purchaser has been established by a variety of cases as will appear in the sequel.

Accordingly in the case of *Ewer* v. *Corbet*,(*f*) the specific devisee of a term for years endeavoured to follow it into the hands of a purchaser from the executor, but Sir *Joseph Jekyll* dismissed the bill, upon the principle before stated.

The last case was immediately followed by that of *Burting* v. *Stonard*,(*g*) in which the testator bequeathed one third part of his personal estate (some of which consisted of terms for years) to such of his children as should be living at his wife's death, and appointed her executrix, naming *B*. overseer of his will, with a small legacy for his care and trouble. The wife sold the leasehold to *B*. and the transaction was established by the decree of Sir *Joseph Jekyll*, who observed, that the case was not so strong as the last, since there was nothing specific nor any particular lease devised to the children.

The cases which have been cited are those of sales only. But the executor's power of absolute disposition necessarily includes that of mortgaging or pledging the testator's estate; a mode of dealing with the assets which (although according to some *dicta*, suspicious,) when properly adopted, may be very beneficial to legatees, by preserving the property entire, when the demands upon it are only of small amount. The act, therefore, of pledging or mortgaging the estate is consistent with a due administration of the assets; and there is no reason, upon any implication of fraud, to deprive the executor of that power and to defeat the title of a *bonâ fide* pledgee or mortgagee. In *Scott* v. *Tyler*,(*h*) Lord *Thurlow* expressed himself to the following effect: It is of great consequence that no rules should be laid down here, which may impede executors in their administration or render their disposition of the testator's effects unsafe or uncertain to a purchaser, his title is complete by sale and delivery, *what becomes of the price* is of no concern to him. This observation applies equally to *mortgages* or pledges, and even to the present instance, where assignable bonds were merely pledged without assignment. Hence it appears, that if the title of the pledgee or mortgagee be purely *equitable*, a court of equity will enforce his security notwithstanding the executor may have misapplied the consideration money.(*i*) The power of an executor to pledge, or mortgage his testator's estate has never been seriously doubted, and even to pay his own debts, if the intention be unknown to the alienee.(*k*) The questions which have arisen and been decided were, whether the transactions as between the executor and the pledgee or mortgagee were *bonâ fide* or not.

Some judges have expressed opinions, that the power of an executor to dispose of the assets may be restricted, so as to make it necessary for a purchaser, mortgagee, or pledgee, to see thatt he money is properly applied; as, when the executor does not take the

(*f*) 2 P. Will. 148. (*g*) Ibid. 150. (*h*) 2 Dick. 725.
(*i*) See 17 Ves. 167. (*k*) 2 Ves. sen. 268.

personal estate merely as executor, but as a *trustee* also, by direct bequest, upon particular trusts declared by the testator.

Thus in *Elliot* v. *Merriman*,(*l*) according to *Barnardiston's* Report, it is said by the Master of the Rolls, "that personal estate may be clothed with such a particular trust, that it is *possible* the Court of Chancery in some cases may require a purchaser to see the money rightly applied; a declaration approved, as it seems, by Lord *Kenyon* M. R. in *Bonney* v. *Ridgard*.(*m*) But such a trust has not yet occurred and received the stamp of judicial authority. It is indeed difficult to conceive how such a trust could be framed to produce the effect supposed to belong to it; for whatever be the trust declared of the personal estate, the executor must first take it in that character to pay the testator's debts, and then, as incident to such obligation, he must have the power of disposition over the assets. He may, therefore, sell or pledge them, and the purchaser or mortgagee in dealing with him is under no necessity of providing that his money shall be applied to the purposes of the will, the administration of the fund belonging *ex officio* to the executor. It being settled that the purchaser or mortgagee is not required to see his money appropriated in the discharge of debts, nor to examine whether there be any or not, the possibility of their existence at the period of the transaction (although all of them may have been satisfied without his knowledge) will support his title under the executor. If then the purchaser or mortgagee be not obliged to take care that the money is applied in payment of debts, it would be unreasonable to require him to look further, and to make him responsible for neglecting to see the money appropriated according to the trusts of the will, whether they be engrafted upon his office as the executor, or the personal estate be bequeathed to another person upon those trusts; the legal interest in each case continuing in the executor until all the debts be paid; and there appears to be no more reason in those cases to permit the *cestui que trusts* to follow the assets in the hands of the purchaser or mortgagee, when the executor has misapplied the money, than in ordinary cases, in which we have seen that claim to be inadmissible to the general and specific legacies.

Lord *Hardwicke* expressed his opinion to the above effect in *Mead* v. *Orrery*,(*n*) a case in which the testator devised to his executors, and their heirs, &c. all his residuary real and personal estates in trust to pay debts, with a direction to make equal division of the surplus among his five children. One objection taken to a mortgage made by the executors was, that they were to be considered *trustees*, and that the whole of the testator's personal estate was affected by the trusts, which rendered it necessary for a purchaser or mortgagee to see not only that the money was properly applied, but that the transaction was such, as was authorized by the trusts, notwithstanding the general power of executors to dispose of the assets in payment of debts in the absence of an express trust, and the safety of a purchaser or mortgagee in taking the property from them without attending to their application of his money; the trust in the present case being (as it was insisted) an exception to the rule.

(*l*) Barnard, Rep. 81. (*m*) 4 Bro. C. C. 130. 1 Cox. 145. (*n*) 3 Atk. 235. 239.

But Lord *Hardwicke* was of a different opinion, judiciously observing, that the *manner* of devising did not alter or restrain the power of executors over the personal estate, and that the substance of the bequest was only an appointment of executors, with a gift to them of the surplus fund to be divided among the children.(*o*)

The case of *Elliot* v. *Merriman*,(*p*) in which the Master of the Rolls expressed himself as before mentioned in regard to the possibility of creating a *trust* of personal estate, which might impose upon a purchaser or mortgagee the necessity of attending to the application of the money, contains an opinion hardly to be reconciled with the other pronounced by him in his judgment; for that was a case where the testator devised his personal estate, together with his real, to the executor, absolutely *charged* (equivalent to a trust) with the payment of debts and legacies. And yet that charge or trust did not appear to the Master of the Rolls sufficient to render it necessary for a purchaser of part of the assets, consisting of leasehold property, to see to the application of the purchase money. His Honour said, "that as to the leaseholds, they are out of the case; for if a man purchase such an estate from an executor, the trust no longer continues upon the land; since, if money be wanting, an executor, must sell. To entertain a doubt to the contrary would make it impossible for an executor to raise assets, as no person would venture to buy. The Court (continued his Honour) chooses rather to abide by its general rules, than to let in nice distinctions in order to relieve particular persons, though even in the case of creditors themselves."

It may probably be considered, for the reasons before stated, and in reference to the last observation respecting the propriety of adhearing to general rules, that it is of no consequence with reference to the power of executors to dispose of the assets, whether they be bequeathed upon *trust* or not.(*q*)

The principle upon which an executor is allowed at law and in equity so extensive a power over property, which he derives from the testator, is the necessity of enabling him to execute his office and trust, and of preventing the inconvenience of implicating third persons in inquiries as to the application of the money produced by conversion of the estate. But that principle will not protect transactions between the executor and a stranger, where the latter is involved with the executor in the commission of a breach of trust, or in a *devastavit*. We shall therefore proceed to consider—

2. Under what circumstances legatees may or may not defeat a sale or mortgage made by an executor, under his general power to dispose of the assets, when he has misapplied the proceeds.

That a legatee, whether general, specific, or residuary, is entitled to follow the assets, appears to be now settled.(*r*) And it seems, that those cases only will form exceptions to the general power with which executors are invested to dispose of the testator's estate, that are founded in circumstances showing or implying collusion between a purchaser or mortgagee and the executor; so as to implicate the former in a charge of participating with the latter in an improper

(*o*) See 17 Ves. 167. (*p*) 2 Atk. 42. Barnard. 78, 81.
(*q*) *Scott* v. *Tyler*, 2 Dick. 712. 2 Bro. C. C. 431. *S. C.*
(*r*) *Hill* v. *Simpson*, 7 Ves. 152. *M'Leod* v. *Drummond*, 17 Ves. 169.

conversion and application of the estate. That the executor may waste the money, is *not alone* sufficient to invalidate his sale or mortgage of the property. In order to produce that effect, it must be shown, that the purchaser or mortgagee was active, and participated in a breach of trust or *devastavit* committed by the executor. In short, it is conceived that the purchaser or mortgagee must not concur in any act, which manifests from the transaction itself that it is not a legitimate mode of administering the estate; it making no difference, whether he be to derive benefit from it or not; for the nature of the transaction imparts *notice* to him that the executor is dealing with the assets not in a due course of administration; a knowledge depriving him of the protection which he would otherwise have under the executor's general power to dispose of the assets, and involving him in all the consequences which belong to a breach of trust or a *devastavit* in the executor, one of which is to entitle the creditors and legatees to follow the assets into his hands. In *Scott* v. *Tyler*,(*s*) Lord *Thurlow* expressed himself as follows upon the present subject: "that if a person *concert* with an executor *by* obtaining the testator's effects at a nominal price, or at a fradulent under-value, or *by* applying the real value to the purchase of other subjects for his own behoof, or *in* extinguishing the private debt of the executor, or *in any other manner* contrary to the duty of the office of executor, such concert will involve the seeming purchaser or his pawnee, and make him liable for the full value."

It follows, from what has been said, that a person cannot take as purchaser or mortgagee any of the assets in consideration of a debt owing *to* him *by* the executor personally, because the transaction is such as cannot possibly be reconciled with the duty of an executor in disposing of the testator's estate; and as Lord *Alvanley* observed in *Andrew* v. *Wrigley*,(*t*) "there cannot be a stronger case of *devastavit*, than in the instance of an executor alienating the property of his testator to pay his own debts," with the *privity* of the alienee. When such is the consideration of alienation, it seems to be the duty of the alienee previously to ascertain whether all the testator's debts have been paid, and the trusts of the will performed; and that the executor has a right to make the disposition, as the person entitled to the property; and if he omit to do so, it is but reasonable that he should be held responsible to the persons having claims under the testator's will. We shall now examine whether these remarks are supported by authority.

In *Crane* v. *Drake*,(*u*) the executor was also devisee, and wasted the assets. The defendant, having notice of the plaintiff's demand (a debt owing by the testator,) purchased of the executor a leasehold estate, part of the assets, for 900*l.*; in the payment for which purchase he was allowed 200*l.* due to him from the testator, a debt owing *to* himself *from* the executor, to the amount of 550*l.*; and the remainder of the purchase money, 150*l.* was paid to the executor. It was determined first at the *Rolls*, and finally by the Lord *Chancellor*, that the plaintiff was entitled to a satisfaction of his debt out of the leasehold estate purchased by the defendant, upon the princi-

(*s*) 2 Dick. 725. (*t*) 4 Bro. C. C. 137.
(*u*) 2 Vern. 616. 18 Vin. Abr. 121. in *marg. S. C.*

ple, that the defendant was a *party*, and *consenting* to and *contriving* a *devastavit*.

It appears that the last case was one of extreme fraud, for not only did the alienee take the assets in liquidation of his own debt due from the executor in his individual character, which according to Lords *Alvanley* and *Thurlow*, was sufficient of itself to invalidate the transaction, as against creditors and legatees; but having notice of the plaintiff's debt, he and the executor (as appears from Lord *Hardwicke's* observations in *Nugent* v. *Gifford*) contrived the alienation to defeat a *bonâ fide* creditor of the testator, and by that contrivance, became a party to, and active in, the commission of a *devastavit*.

The next case which occurred, was *Pagett* v. *Hoskins*,(*x*) in which a testator, being possessed of 18,000*l.* gave 6000*l.* a piece to his two daughters, and appointed his wife executrix, who consequently became entitled to the remaining 6000*l.* Upon the widow's second marriage, she stated her first husband's estate at about 18,000*l.* and retained 6000*l.* as her share of it; in consideration of which, her second husband agreed by articles to settle a jointure upon her, the articles reciting the 6000*l.* to be part of the first husband's assets, and as his widow's proportion, but subject to the result of an account which was then unsettled, upon the taking of which, if her share should be found less than that sum, the second husband provided for himself an indemnity. Under those circumstances, and in consequence of a reduction of the testator's estate by losses to 6000*l.* Lord *Cowper* decreed, that the two children were entitled to follow the 6000*l.* which had been received by the second husband. And although his Lordship said, that his decree was wholly founded upon the circumstances of the case, yet it is presumed on the authority of the high opinions before stated, that if there had been no such particular circumstances attending the transaction, still, since the consideration upon which the 6000*l.* came into the hands of the second husband, was such as to be inconsistent with the duty and office of an executrix, in administering the assets of her testator, *viz.* in applying them for the purchase of a benefit to herself, the second husband could not retain them either against the testator's creditors or legatees; but that the nature of the transaction with an executrix, imposed upon him the obligation to make such inquiries as before mentioned.(*y*)

The next two cases in succession, are in favour of the executor's power of alienation, though made to answer his own private purposes, and in breach of his duty as executor; but their principle is considered to be unstable and unsatisfactory.

The first case is *Nugent* v. *Gifford*,(*z*) in which a term for years being vested in trustees for Sir *Richard Billings*, he bequeathed several specific legacies, and made Mr. *Arundell* executor and residuary legatee. Two years after the testator's death, *Arundell* became indebted to *Knight*, one of the trustees of the term, and assigned it to him. The question was, whether the testator's daughters, as creditors of the testator, were entitled to follow the term into the hands of *Knight;* they insisting, that the assignment being

(*x*) Pre Ch. 431. Gilb. Eq. Rep. 111. *S. C.* and see 1 Atk. 464.
(*y*) *Ante*, p. 303. (*z*) 1 Atk. 463. and stated from Reg. Lib. 4 Brd. C. C. 136.

in consideration of the executor's own debt, was void as against them. But Lord *Hardwicke* decided to the contrary, under the impression that the executor's general power of disposition, enabled him to alien the term even for his own debt. That certainly was the sole principle, upon which his Lordship grounded his decree; and the circumstance of the executor being also residuary legatee was not noticed, although Lord *Alvanley*, in his comments upon the case,(*a*) attributes great importance to that accident; observing, that it was not incumbent upon a purchaser from an *executor* and *residuary* legatee, to inquire whether the debts were paid; an observation equally true and apposite, whether the executor be residuary legatee or not; but the principle does not apply in either case where the consideration of purchase is the *private* debt of the executor. Let us separate the two characters, and examine them apart, to discover, whether the executor, being also residuary legatee, can affect the rights of creditors or legatees. It is presumed, that, as mere executor, his disposal of assets to pay or secure his own debt, could not prejudice individuals interested under the testator's will; and as residuary legatee, he could only dispose of what he was entitled to in that character, *viz.* what remained after all the trusts of the will were performed. It appears then, that the accident of an executor being also residuary legatee, cannot upon principle impart to him any larger authority over the assets than what he possessed by virtue of his office as executor;(*b*) a consideration confirmatory of the supposition, that the case of *Nugent* v. *Gifford* was, as appears from the report, determined by Lord *Hardwicke* upon the principle, that the general power of disposition, which the law gives to executors for the sole reasons before stated, authorizes them, in subversion of those reasons, to sell or pledge the assets for their own individual debts.

The second case, in which his Lordship expressed a similar opinion is, *Mead* v. Lord *Orrery*.(*c*) There, the executors (one of them named *John Mead*, being entitled to a share of the residue) assigned a mortgage belonging to the testator, as a security in respect of a receivership, to which *John* the co-executor had been appointed. *John* having died greatly indebted on account of his receipts of money as receiver, the question was, whether the assignment was binding upon the other residuary legatees? And Lord *Hardwicke* determined in the affirmative, upon the same principle, that he decided the case of *Nugent* v. *Gifford*; for although there were other circumstances, yet all of them being accessories to the general power of executors to dispose of the assets, must stand or fall with it.

Notwithstanding it clearly appears from the last two cases, that Lord *Hardwicke's* decrees were founded upon the general power of executors to sell or pledge the personal estate of their testators, yet, in a subsequent case of *Taner* v. *Iver*,(*d*) his Lordship seems to have been so forcibly struck with the impropriety of extending that power so far, consistently with the reasons for which it was given, as to enable executors to dispose of the assets in satisfaction of their own

(*a*) 4 Bro. C. C. 137. (*b*) *Scott* v. *Tyler*, 2 Dick. 712.
(*c*) 3 Atk. 235. (*d*) 2 Ves. sen. 469.

debts, that he disavowed his decision in *Nugent* v. *Gifford*, and as may be inferred, his decree in *Mead* v. *Lord Orrery*, having been made upon any *general principle*, but on the *particular circumstances*. Hence Lord *Hardwicke* in abandoning a ground, which, if tenable, would have supported both decrees, showed at least his doubt, whether the general power of executors over the assets would enable them to dispose of the estate for their own purposes, in a way declaring to the purchaser or mortgagee, that they were not dealing with the property in their character of executors. That such a power would be mischievous in the highest degree is obvious. It would enable an executor to dispose of or pledge the estate for any purpose, however inconsistent with that office, in short, he would be authorized to do whatever he pleased with the property of his testator. Common sense revolts at the construction of the executor's power of disposition to such an extent, and we find the sentiments of Lords *Thurlow* and *Alvanley* in unison against it.(*e*) In *M'Leod* v. *Drummond*,(*f*) Lord *Eldon* considered the authority of the last two cases to have been shaken by Sir *Thomas Sewell* and Lord *Kenyon* in *Bonney* v. *Ridgard*;(*g*) the latter judge observing, in allusion to *Mead* v. Lord *Orrery*, that it became him to think seriously before he differed from Lord *Hardwicke*, but he could not subscribe to his Lordship's opinion there expressed, and that had the case come before him for decision, he would have determined it otherwise, an opinion which he proved in detail in *Bonney* v. *Ridgard*, which was as follows:

The testator bequeathed to his wife and three daughters all his estates (leaseholds) in equal shares, with a direction to his wife and one *Theobald* his executors to dispose of them. The testator died in the year 1748, and his youngest child attained twenty-one in 1764. The widow alone proved the will, and married *Ridgard*. They joined in a mortgage of the land to a Mrs. *Mascall*, and in 1752 they assigned to one *Barnard* the equity of redemption for 350*l.* which sum was composed of two debts (in the whole 344*l.*) owing from *Ridgard* to *Barnard*, and of 6*l.* in money, paid when the assignment was executed; the deed reciting the two debts. *Barnard* sold the estate, and he and his vendees had been in the possession of it from the year 1752, to, and during the pendency of the suit in 1784. The question was, whether the daughters and their husbands were entitled to recover the property, notwithstanding the assignment to *Barnard*, and his sale of it? Sir *Thomas Sewell*, M. R. determined in the affirmative; a decision, which not being acquiesced in, the cause was re-heard by Lord *Kenyon*, M. R. who, although he decided against the plaintiff's on account of the length of time which had elapsed between the accruing and the prosecution of their claims, yet he expressed what his decision would have been had he been under the necessity of determining upon the merits of the case; since his Lordship's observations are clear and important, that consideration will apologize for the submission of them in detail to the reader. "As far as respects the mortgage to Mrs. *Mascall* (in which there is a general recital only that *Ridgard* and his wife had occasion for 1000*l.*) I (said his Lordship) have had some hesitation, but

(*e*) *Ante*, pp. 303, 304. (*f*) 17 Ves. 165. (*g*) 1 Cox, 146. 148.

upon the whole, I do not think that transaction impeachable, for I am of opinion, that a purchase from an executor need not have any recital of the purpose for which the money is raised. He is allowed to trust the person whom the testator had trusted. If, on the other hand, the money *appear* to have been borrowed for *improper* purposes, to be sure the transaction cannot stand. Here the husband and wife join in the mortgage. The *purpose* for which the money is wanted is *undefined*. The money came to the hands of the executrix which it was *her* duty to apply; and for any thing Mrs. *Mascall* could know, it was properly applied. Therefore so far as any person stands in *privity of estate* with Mrs. *Mascall*, the transaction is valid. But then comes the deed of 1752, which releases the equity of ademption to *Barnard*, and recites that *Ridgard* was then justly indebted to *Barnard* in 200*l.* by bond, 17*l.* for interest, and 127*l.* by simple contract, which sums with the payment of 6*l.* formed the consideration of sale. This was a *few months after* the marriage of *Ridgard* to the executrix, which satisfies me, that this money was not raised for fair legal purposes. The fund in the hands of the widow was applicable to the payment of the debts, &c. and after that to certain defined puposes declared by the will. *Barnard* had full notice of the will, he knew that, after the debts were paid, this fund ought to be so applied, and he *therefore* connived at its being misapplied. If, then, the case turned upon this, I should be bound to set aside the transaction, or rather to turn the defendants into trustees for the plaintiffs."

The substance of his Lordship's opinion may be thus stated. If there were debts of the testator subsisting at the time of the release to *Barnard* the transaction with him was of such a nature, as showed that he was consenting to a *devastavit* in the executrix, *viz.* in accepting from her part of the assets in satisfaction of a debt due from her husband personally to *Barnard*, which was inadmissible. On supposing all the debts to have been discharged, the consequence would be the same; since it was the duty of *Barnard* to have seen that all the trusts of the will had been performed, and that the executrix was entitled to the property, before he accepted any of the assets in payment of the debt due to him from her husband. The reason is, that part of the consideration being the debt of the executrix's husband, clearly showed that the purchaser was not dealing with her as executrix; so that the power of disposition given to executors over the assets of their testators did not apply to such a case.

If that reason be correct, the case of *Whale* v. *Booth*,(*h*) may be doubted. There the executors confessed a judgment to one of their own creditors, and permitted him to take in execution assets belonging to their testator, and joined in executing to him a bill of sale. Lord *Mansfield* and *Buller*, J. held upon the principle of the executor's power to dispose of the whole, that the title of the executor could not be impeached at the instance of a creditor of the testator.

From the observations made at the conclusion of the case of *Bonney* v. *Ridgard*, *viz.* that the purchaser did not deal with the executrix in that character, as was manifest when he took from her the assets for a consideration which had no connection with her

(*h*) 4 Term. Rep. 625. *in notis.*

office, it appears that the case of *Whale* v. *Booth* was improperly treated, when considered as a question upon the power of executors to dispose of their testator's personal estate; for it ought rather to have been viewed as a transaction between strangers, where the vendors, in order to make a good title, must have shown, that all claims affecting the property had been discharged, and that they were in a situation to dispose of it free from incumbrances.

The case of *Farr* v. *Newman*,(*i*) which followed that of *Whale* v. *Booth*, was not a decision on the present question. It is true, that the Judges, probably in deference to the case last mentioned, and to those before Lord *Hardwicke*, of *Nugent* v. *Gifford* and *Mead* v. Lord *Orrery*,(*k*) treated, as if settled, the power of executors to dispose of the assets to their own creditors to the prejudice of the creditors and legatees of the testators; yet they, as well as Lords *Hardwicke* and *Mansfield*, admit, that if there be any *contrivance* between an executor and his own creditor, to enable the former to commit a *devastavit*, that circumstance *excepts* the case out of the general power of the executor to dispose of the estate. Can there be stronger evidence of *contrivance* for that purpose than in the instance of a creditor of the executor accepting the property of a testator in payment of a debt due to him by the executor, whose office and duty proclaim that the executor was, in so doing, dealing with the assets not as executor, but as his own? And what necessity can there be, in order to the *due* administration of the estate, to arm an executor with the power of wasting the assets, when the person receiving them from him had, or ought to be considered as having, notice of the misapplication from the transaction itself.

Upon the whole, it is submitted that neither at law nor in equity does the power of an executor extend to authorize him to sell or pledge the testator's assets with a creditor of his own, so as to prevent the persons interested under the testator's will from following them; for the law seems to say, as declared by Lord *Kenyon*, "Let executors do their duty, and let the *authority cease where injustice begins.* (*l*)

But whatever may be the decision of a court at law, it may be considered, that a court of equity would not permit such a vendee or mortgagee to retain the assets acquired by him for his own debt owing by the executor individually, and not as executor. In addition to *Crane* v. *Drake* and *Pagett* v. *Hoskins*, before stated, and more pointedly confirmatory of this remark than those cases, is the case of *Scott* v. *Tyler*(*m*) which was as follows:

The testator gave his securities on the river *Lee* to his executors, who were also *trustees* for the separate use of *Margaret Christiana*, then married, until she attained the age of twenty-one, and then for her absolutely. The testator died in the year 1776, leaving the securities with Messrs. *Hankeys*, his bankers, with whom they had been deposited for safe custody in a locked box. *Elizabeth Tyler*, one of the executors, and sole *residuary legatee*, being extensively engaged in trade, caused the box to be opened about three years

(*i*) 4 Term. Rep. 621.
(*k*) *Ante*, pp. 304, 305.
(*l*) 4 Term. Rep. 651. and see *Eyre*, C. J.'s remarks in *Quick* v. *Staines*, 1 Bos. & Pull. 295. and those of Lord *Eldon* in *M'Leod* v. *Drummond*, 17 Ves. 154. 155.
(*m*) 2 Dick. 712. 724. 2 Bro. C. C. 431. *S. C.*

after the testator's death, and being at that time greatly indebted to the bankers on her separate account, she pledged with them ten of the river *Lee* securities, (which were bonds) for securing not only their *prior*, but also all their *subsequent* advances for her; but the bonds were *not assigned*. Mrs. *Tyler* having become a bankrupt, the question was, whether the bankers were entitled to retain the bonds against *Christiana*? The case, though compromised, nevertheless contains Lord *Thurlow's* decided opinion against the bankers, upon the principle of the deposit having been made for the executor's private debt, for which they knew the assets not to be liable until all the debts and legacies were satisfied. This manner of dealing, therefore, with the estate, placed the bankers under an obligation, as before observed, to ascertain at their own peril the fact above-mentioned, before they accepted any of the assets in pledge for the private debt of the executrix.

Lord *Eldon's* observations, in commenting upon the last case, must not be omitted. "If (said his Lordship) an executor cannot deposit securities for *future* advances to be made to him, not in his character of executor, but as a trader, it is difficult to hold that he may make the deposit for *present* advances not as executor, but as a customer of the bank, in his own individual trade.(*n*)

The case that followed, and bearing great resemblance to *Scott* v. *Tyler*, was *Hill* v. *Simpson*,(*o*) in which Mrs. *Smith*, being an executrix and a legatee under the will of her deceased husband, and having possessed all his assets, bequeathed her personal estate (subject to her debts, funeral and testamentary expenses, and *to her late husband's will*) to her three nephews, the defendant *Simpson* being one of them, and appointed them executors. *Simpson* alone proved the will, and received the testatrix's personal estate, and some of her late husband's assets, part of which, consisting of government securities, *Simpson* transferred to *Moffatt & Co.*, his bankers, as a security, not only for what he *then* owed, but for so much money as he might *afterwards* become indebted to them. This transaction took place within a *month* after the death of Mrs. *Smith*. *Simpson* having become a bankrupt, the question was, whether Messrs. *Moffatt & Co.* could retain the property against the claims of two *general* legatees of Mrs. *Smith*? And Sir *William Grant*, M. R. determined in the negative, upon the same principle that Lord *Thurlow* would have decided *Scott* v. *Tyler*, had that case been submitted to his decree. His Honour observed, that if the second point in *Scott* v. *Tyler* had received the decision which it was generally supposed would have been given, (*p*) it would be an authority far beyond what those plaintiffs want; for in that case the executrix had disposed of the river *Lee* bonds *four* years after the death of the testator. The bankers swore they knew nothing of the will, and they believed the bonds to be her own property, not that of the testator. If that case had been decided against the bankers,

(*n*) 17 Ves. 166. (*o*) 7 Ves. 152.

(*p*) That Lord *Thurlow's* judgment would have been against the bankers, appears from 2 Dick. 724. And in *M'Leod* v. *Drummond*, 17 Ves. 166. Lord *Eldon* declared he could confirm Mr. Dicken's assertion, that the judgment stated by him contained Lord *Thurlow's* opinion, and intended to have been delivered by him, if the cause had not been compromised.

it would have furnished a stronger authority than is necessary for these plaintiffs.(*q*)

Since the observations of the *Master of the Rolls*, in delivering judgment in the last case, are confirmatory of those which have been previously submitted upon this difficult subject, that consideration will apologise for their insertion. "The express purpose (said his *Honour*) for the transfer of the funds, appears to have been to secure a debt of the executor's own, which he *already* owed to the bankers, and *other* advances they were to make by taking up bills of his then actually outstanding. The *bankers*, therefore, had distinct notice that the money was not to be applied to any demand upon the estate of either testator, but the assets were to be wholly applied to the private purpose of the executor. Allowing every case to remain undisturbed, does it follow from any that an executor in the *first* month after the testator's death can apply the assets in payment of his own debt, and that a creditor is perfectly safe in so receiving and applying them, provided he abstain from looking at the will, which would show the existence of unsatisfied demands?" It is clear in regard to an executor thus dealing and being dealt with, that *no rule of justice* permits, *nor of convenience requires*, that he should have this unbounded power. Although it may be dangerous at all to restrain the power of purchasing from him, what inconvenience can there be in holding that the assets, known to be such, should not be applied in any case *for the executor's debt*, *unless* the creditor should be *first* satisfied of his right? It may be essential that the executor should have the *power to sell* the assets, but it is *not* essential that he should have the power to pay his own creditor; and it is *not just* that one man's property should be applied to the payment of another man's debt."(*r*) Sir *William Grant* also considered it to have been the duty of the bankers, before they accepted a transfer of the funds, to have satisfied themselves of the executor's right to pledge the assets for a debt of his own.(*s*)

To the decision before stated against the power of executors to sell or pledge the assets with a creditor for their own debt, may be added the opinions of Lord *Alvanley* in *Andrew* v. *Wrigley*,(*t*) of Lord *Eldon* in *M'Leod* v. *Drummond*,(*u*) and of Sir *John Leach* in *Keane* v. *Robarts*.(*x*)

A difficulty may occur in ascertaining the nature of the transaction between the executor and the person to whom he has disposed of the assets; *i. e.* it may be doubtful whether the pledge of alienation was in fact made by the former in the proper prosecution of his trust, or in satisfaction of, or to secure his own private debt. Upon this subject opinions seem to agree in the following distinction: When no money is paid for the purchase or deposit, and it appears that the executor was indebted at the time to the purchaser or mortgagee, it will be presumed, in the absence of contrary evidence, that the sale or mortgage was made in consideration of that debt, which being a *devastavit* in the executor with the privity and concurrence of the alienee, will invalidate the transaction in regard to persons claiming under the testator. But that when the consideration is

(*q*) 7 Ves. 169. (*r*) 7 Ves. 168. (*s*) Ibid. 170.
(*t*) 4 Bro. C. C. 136. (*u*) 17 Ves. 154. 170. (*x*) 4 Mad. 357.

paid at the *time* of the *sale* or *deposit*, then as the transaction is consistent with a fair administration of the assets, the presumption will be (subject to rebuttal by proof of a different intention,) that the transaction was *bonâ fide*, and the money advanced to enable the executor to execute the purposes of the will.(*y*)

An instance, however, occurred in *M'Leod* v. *Drummond*,(*z*) which, in Lord *Eldon's* opinion, as also in that of Sir *John Leach*,(*a*) would be sufficient evidence of fraud in the alienees to deprive them of the benefit of their security, notwithstanding they gave a consideration for it to the executors. In that case the advances of Messrs. *Drummond* (although paid at the time of the deposits) were made to two executors (who were partners as army agents,) but were so made to them in the course of their business as army agents, credit being given to them, not as executors, but to their account with Messrs. *Drummond* in the way of their private business, which was confirmed by the circumstance that the deposits did not consist of assets alone, but also of the separate property of the executors. Lord *Eldon* therefore considered the bankers as much parties to the *devastavit*, as if they had applied the money to pay the private debt of the executors, it being quite immaterial whether the advance were made for the latter purpose, or to the private trade of the executors.(*b*)

If indeed the pledge of the assets in the last case were to be considered valid, then as the deposit consisted of property of the executors, as well as of the testator, should the whole of it exceed in value the debt or advance for which it was a security, the persons beneficially interested in the testator's estate would have an equity to have the pledged assets exonerated by that portion of the deposit, which formed part of the individual property of the executors.(*c*)

Any artifice between an executor and a third person, by which a misapplication of the assets is affected, will vitiate the transaction; and however artfully the plan be contrived, it will not be permitted, when detected, to operate to the prejudice of persons interested under the will. Now executors may appoint an agent to collect and dispose of the testators's estate, and to remit the produce to them, and such person is only answerable to his employers; and although he may be acquainted with the circumstance of their misapplying the estate, yet he will (as it seems) be justified in performing his duty in faithfully remitting to them the assets collected under his authority;(*d*) and creditors or legatees of the testator have no equity to make him responsible for so much of the estate as he transmitted to the executors after acquiring such knowledge.(*e*) But it is conceived, that if the person were not merely such agent as beforementioned, but also agent to the executors, in *their private concerns*, and *he made advances* to them for *their separate use*, he would not be permitted to bring those loans in account with his agency in respect to the testator's assets, so as to charge that fund with them; since, if he were allowed to do so, it would be enabling an executor to accomplish that *indirectly*, which he could not effect *directly*, *viz.* an appropriation of the estate to his own debt, with

(*y*) See *Scott* v. *Tyler*, 2 Dick. 725. *M'Leod* v. *Drummond*, 14 Ves. 362. 17 Ves. 155. (*z*) 17 Ves. 156. (*a*) 4 Mad. 359. (*b*) See 14 Ves. 356. 17 Ves. 156. (*c*) 17 Ves. 158. (*d*) *Keane* v. *Robarts*, 4 Mad. 356, 359. (*e*) Ibid.

the privity and contrivance of the creditor. It would be converting the union of the two agencies into an engine of fraud.

If an executor be not permitted to sell or pledge any of the assets for his *own debt*, to the prejudice of creditors or legatees of the testator, upon the ground of the direct notice, which the transaction gives the alienee, that the executor is not dealing with him as executor, it is requisite to consider whether, if a purchaser or mortgagee of the estate know the executor wastes the assets, or that he will misapply the produce from the sale or mortgage, such notice will except the transaction out of the general power of the executor to dispose of the testators estate?

The criterion by which all questions upon the present subject are to be examined, is, whether the person dealing with the executor for the testator's assets, can be charged with *fraud*, which implies collusion.(*f*) The testator has trusted the executor with the administration of his estate; and the law, as incident and necessary to the performance of that duty, has empowered the executor to dispose of the assets under his own personal responsibility. If then a transaction be no more than a sale or pledge of part of the estate of money advanced at the time; that the executor intends to misapply it, is indifferent to the alienee, if he be ignorant of that intention; for the law presumes the disposition to have been made for the purposes for which it gives an executor the power of sale;(*g*) and there is no obligation upon the alienee to see to the application of the money, unless he have notice of all the debts having been paid, a knowledge which he is not bound to be active in acquiring. Hence it is presumed, that, although a person have notice, at the period of advancing the money and receiving the assets, that the executor has misapplied part of the general estate, that fact and notice will not vitiate the transaction; for *non constat* that the money may not be wanted and may not be applied, notwithstanding the prior misconduct of the executor, in payment of debts, and the alienee is entitled to trust the person whom the testator has trusted. There is nothing upon the face of the transaction importing it to be inconsistent with the duty or character of an executor. The alienee has substituted an equivalent in the hands of the executor, in lieu of the assets received, with the due administration of which he has no concern, and there is no understanding between the parties that the money shall not be applied as part of the estate of the testator.(*h*) There seems, therefore, in such cases to be no solid ground for permitting creditors or legatees of the testator to follow the assets into the possession of the alienee. But, according to the test before noticed, it is conceived that the result would be different, if the alienee knew at the time of the transaction that his money was to be appropriated by the executor for purposes of his own; since such an application is not the usual mode of administering the estate, it bears the impression of concert and collusion between the parties to commit a *devastavit*, and also of contrivance to injure the persons interested in the assets. In truth, the alienee does not treat with the executor in the character of executor, so that the power of disposi-

(*f*) 4 Bro. C. C. 133. 4 Term. Rep. 625. *in notis.*
(*g*) 17 Ves. 154. (*h*) Ibid. 163.

tion annexed to that office is inapplicable to such a case. For these reasons, it is presumed that a transaction so circumstanced would not be supported against creditors or legatees under the testator's will;(*i*) and more especially if the alienee has notice of a subsisting debt due from the testator.(*k*)

It was observed in the beginning of this section, that the principle upon which the law gave to the executor so absolute a power of disposition over the personal assets, was necessity, *viz.* that he might not be impeded in converting the funds into money, and applying them in discharge of the testator's debts.(*l*) For the same reason, the law exempts a purchaser or mortgagee of the assets from the obligation of seeing his money applied in payment of the debts, or of inquiring whether there be any; and confines the responsibility, as to the administration, to the executor alone, as the testator himself had done. But if the debts be paid, and the alienee had notice of the circumstance when he paid his money, and took the assets, it is presumed (although at law the disposition would be effectual) that, since the executor is only a *trustee* for the purposes mentioned in the will, a court of equity would require the alienee to see that the consideration he gave for the property was applied to the specific trusts declared in such will, upon the same principle that it expects from a purchaser of a trust estate to see his money appropriated in satisfaction of the particular and defined trusts contained in, or in a schedule to, the instrument in which they are enumerated.(*m*) I have found no express decision on the subject, nor any thing like authority except an inconclusive opinion in affirmance of the above remarks by Sir *Joseph Jekyll* in the case of *Ewer* v. *Corbet*,(*n*) in which he *admitted*, "that if an executor should sell a term to a person who had notice that there were *no* debts, or that all the debts were paid, such a case might require a different consideration," there being no such ingredient in that before him. In *M'Leod* v. *Drummond*,(*o*) Lord *Eldon* refers to these expressions of the *Master of the Rolls*, and abstained more carefully than the latter from giving any opinion upon the effect of such notice.

3. When the dealing between executors and their alienee of the assets is such as cannot be supported, the right of the testator's creditors or legatees to follow them, may be barred in consequence of their omission to enforce it within a reasonable time.

Thus in *Elliot* v. *Merriman*,(*p*) the testator's creditors attempted to follow the assets into the hands of the purchasers from the executor, after an undisturbed possession for sixteen years; but their bill was dismissed: Lord *Hardwicke* observing, that length of time was no favourable circumstance for the creditors, since had they come to the Court recently and prevailed against the purchasers, the latter might have had satisfaction against the vendor, who, in that case, although he had then become a bankrupt, was solvent for some years after the sales.

So in *Bonney* v. *Ridgard*,(*q*) a suit by legatees, the sale was made

(*i*) 1 See Cox, 148. 17 Ves. 156. 171. 2 Dick. 725.
(*k*) 2 Vern. 616 and *ante*, pp. 302, 303. 3 Atk. 240. 17 Ves. 161.
(*l*) *Ante*, p. 298. (*m*) Barnard. Rep. 81. (*n*) 2 P. Will. 149.
(*o*) 17 Ves. 162. (*p*) 2 Atk. 41. Barnard. Rep. 82. (*q*) 1 Cox, 145. 148, 149

in the year 1752, and the testator's youngest child, one of the persons interested, came of age in 1764; but from 1752 till the commencement of the suit, about the year 1780, the vendee claiming under the executor, had been in peaceable possession of the estate; so that the same number of years elapsed between the accruing of the right and its exertion as in the last case. Lord *Kenyon*, M. R. dismissed the bill, on account of the negligence of the plaintiff's in not earlier prosecuting their claims.

The case which next followed was *Andrew* v. *Wrigley*,(*r*) in which legatees sought to recover a leasehold estate, bequeathed to them, which had been mortgaged, and afterwards sold under a title derived from the administratior with the will annexed. The claim in respect of the mortgagee was abandoned, and it appeared that from the year 1758 to 1779, the first two purchasers had been in possession of the property, contrary to the intention of the will, and that in the latter year the estate was again sold by the vendees by public auction, at which sale the plaintiffs, legatees, gave notice of their claims. Lord *Alvanley* decided two points. First, that after an acquiescence for twenty-one years, the legatees could not have recovered the estate from the first two purchasers; and secondly, that, as the last vendee bought the estate from the persons who had no knowledge of those claims, notice of them to him was of no consequence, since he was entitled to protect himself under the want of notice in those persons from whom he derived the property for a valuable consideration.(*s*)

The last case upon the present subject is *M'Leod* v. *Drummond*, first decided by Sir *William Grant*, and finally by Lord *Eldon*. The case consisted of a variety of circumstances, and it was singular in this respect, that the suit was by two executors (who had not previously interfered in the administration) against pledgees of parts of the assets by the other two and sole acting executors, for the private debt of the latter. No persons beneficially interested in the property under the will were before the Court. The testator died in 1786, and the bill was filed in 1804. In 1792 the first pledge of the estate was made, and afterwards several like transactions took place between the same parties up to the year 1804; during the whole of which period, neither the plaintiffs, nor any persons interested in the deposits, made any objections to those dealings with the estate. Under those circumstances, both Sir *William Grant* and Lord *Eldon* determined, that the titles of the pledgees could not be shaken; not by the plaintiffs in the character of two unoffending executors, because they were not beneficially interested, and never interfered in the executorship from 1786 to 1801, nor by any persons interested for themselves or others, since they had slept upon their rights during the same period.(*t*)

Sect. III. Of the refunding of Legacies.

In the last section was considered the right of legatees to follow the assets in the possession of *strangers* under titles derived from the executor by sales or pledges. It remains to consider the rights of executors, creditors, and unsatisfied *legatees*, to call back parts of

(*r*) 4 Bro. C. C. 125. (*s*) Ibid. 136. (*t*) 14 Ves. 353. 359. 363. 17 Ves. 171.

the estate, which have been overpaid to one or more of the legatees, by reason of a defect of assets. And—

1. As to the right of an executor to oblige a legatee to refund.

It is a rule in equity, to presume, when an executor voluntarily pays one or more legacies that he has received sufficient assets to discharge all the rest; and although the fact be otherwise, not to admit evidence to that effect. In such cases, therefore, the executor will be under the necessity to make up the deficiency with his own money, since a court of equity will not (except in the instances after mentioned) permit him to institute proceedings against any of the legatees, so paid, to oblige them to refund. For, it being the executor's own folly to make such payments before the amount of the estate could be ascertained, or his negligence in not acquainting himself with its amount, when that information might have been obtained,(*u*) neither of those grounds entitles him to the interference of a court of equity to be relieved against such his acts and assents to the legacies.(*x*) Upon this principle, it is conceived that the above rule is founded, and to which may be ascribed the following decision:

In *Coppin* v. *Coppin*,(*y*) *A.* after giving several considerable legacies, appointed his brother the plaintiff, executor and residuary legatee, who stated in his bill, that he had paid the legatees more than the assets would allow, merely upon a misrepresentation of their value, the estate having sustained unexpected losses; he therefore insisted that, if by importunity or from kindness to several of the legatees (who were his relatives,) he had paid legacies beyond the assets, such over payments ought to be refunded. But Lord *King*, Ch. was of a contrary opinion, and said there did not appear to be any fraud or misrepresentation by the legatees to whom the payments had been made; there being on the other hand, much more reason to consider the executor to be better informed concerning the testator's circumstances than the legatees; whom therefore his Lordship would not order to refund in such a suit.

Sir *John Strange*, M. R. expressed himself to the like effect in *Orr* v. *Kaines*,(*z*) "The rule (said he) is, that, *whenever* an executor pays a legacy, it is presumed he has sufficient to pay *all* legacies, and the Court will oblige him, if solvent, to pay the rest, and not permit him to maintain a suit to compel the legatee whom he *voluntarily* paid, to refund.

So in *Keylinge's* case,(*a*) *A.* after giving several legacies, appointed *B.* his executor and residuary legatee. Great part of the assets consisted of *East India* stock, which *A.* directed to be converted into money with all convenient dispatch. The stock bore a good price at *A.'s* death, and some of the legatees requiring payment of their legacies, *B.* gave them bonds for the amounts, under the impression that the estate was sufficient to pay all the legacies. *B.* kept the stock, which became so depreciated in value as to cause a deficiency of assets fully to discharge the other legacies. In consequence of this accident, *B.* instituted the suit against the legatees

(*u*) 2 Ves. sen. 194. (*x*) 2 Ventr. 360. 1 Vern 94. (*y*) 2 P. Will. 292. 296.
(*z*) 2 Ves. sen. 194. and see *Newman* v. *Barton*, 2 Vern. 205.
(*a*) Hil. Term, 1702. reported 1 Eq. Ca. Abr. 239. pl. 25.

to whom he had given bonds, to oblige them to refund and abate, and that those remaining unpaid might take their legacies proportionally at the then price of the stock. But the *Lord Keeper* declined to relieve against the bonds, and ordered *B.* to answer for the stock at its value at the expiration of a year after the testator's death.

Since payments made to legatees by an executor under the circumstances before described amount to a *devastavit*, by reason of there being a voluntary and improper disposition of assets to the prejudice of other legatees, it follows, that if a legatee obtain payment of his legacy by compulsion, as by a decree in equity, or if just debts be discovered and paid by the executor after discharge of some of the legacies, he may maintain a suit to oblige those legatees to refund; for it is clear, that in neither case was his disposition of the assets blameable, so as to charge him with the commission of a *devastavit*.

Accordingly in *Newman* v. *Barton*,(*b*) the Court distinguished between the *voluntary* and *compulsory* payment of a legacy by the executor; holding that he could not oblige the legatee to refund in the first instance, but that he was entitled to do so in the second. Again—

In *Nelthrop* v. *Biscoe*,(*c*) it was said, and admitted by the Court, that if executors pay away the assets in legacies, and afterwards debts appear, and they be obliged to discharge them, (of which debts they had no notice before the legacies were paid,) the executors by a bill might compel the legatees to refund.

So also in another case,(*d*) where an executor filed a bill against a legatee to refund a legacy *voluntarily* paid him by the executor, the assets falling short to satisfy the testator's *debts*, the legatee was ordered to refund; the Court declaring that an executor may institute a suit against a legatee to refund a legacy voluntarily paid, as well as a creditor, and for this reason; an *executor paying a debt* of the testator out of his own pocket stands in the creditor's place, and has the same equity against a legatee to compel him to refund.

2. That a creditor has a right to call upon legatees to refund is a proposition which cannot be doubted. The certainty that a creditor has such a privilege was declared by the Court of Chancery, in *Noel* v. *Robinson*,(*e*) and *Newman* v. *Barton*,(*f*) and was acted upon in the following instance:

A. being indebted to *B.* appointed *C.* his executor. *C.* wasted the assets, and died, having bequeathed several legacies, and appointed *D.* his executor, who paid those legacies. *B.*, the creditor of the first testator, commenced a suit against *D.* for the payment of the debt, and also against the legatees of the second testator, who was the executor of the first, to compel them to refund, there not being a sufficiency of assets of the first testator. And the Court ordered the legatees to refund.(*g*)

3. With respect to the equity of one legatee to make another refund, it may be stated as a *general* rule, that an unsatisfied legatee

(*b*) 2 Vern. 205. (*c*) 1 Chan. Ca. 135.
(*d*) *Davis* v. *Davis*, 8 Vin. Abr. "Devise," 423. pl. 35.
(*e*) 1 Vern. 94. (*f*) 2 Vern. 205. (*g*) Anon. 1 Vern. 162.

cannot maintain a suit against another, who has been paid by the executor; because the remedy in the first instance, is against the executor;(*h*) who, by discharging one legacy, has admitted assets for the payment of all.

But an exception to this rule occurs, when the executor is in *insolvent* circumstances; for since the unsatisfied legatee can have no redress against him, he would be without a remedy, unless permitted to call upon the other legatee to refund.(*i*) Still this permission is qualified, and subject to the following distinctions:

If the assets be *originally sufficient* to satisfy all the legacies, and one of the legatees procure from the executor, either by or without suit, payment of his legacy; and then the executor wastes the estate, so as to render it deficient to discharge the remaining bequests, those legatees cannot oblige the satisfied legatee to refund: 1st. because the payment was not *a devastavit* in the executor; and 2dly, because the legatee is protected by the principle, that *vigilantibus, non dormientibus jura subveniunt.* But—

If the assets be *originally deficient* to answer all the legacies, and a legatee receive from the executor his legacy in full; in that case, as the payment was a *devastavit* by the executor, and it is a rule in equity, that upon a deficiency of assets, all general legatees shall proportionally abate, the Court will entertain a suit by the unsatisfied legatees, to compel the one so paid, to refund.

The distinctions upon the present subject are thus stated by Sir *Joseph Jekyll*,(*k*) in the case referred to in the note. "That as all the legatees are, upon a deficiency of assets, to be paid in proportion, so, if the executor paid one of them, the rest should make him refund in proportion; and if one of the legatees obtained a decree for his legacy, and was paid, and afterwards a deficiency happened, the legatee who recovered should refund notwithstanding, in imitation of the spiritual court, where a legatee recovering his legacy was made to give security to refund in proportion. But that if the executor had *at first* enough to pay all the legacies, and *afterwards* by his *wasting* the assets occasioned the deficiency; the legatee, who had recovered his legacy, should not be compelled to refund, but should retain the advantage of his legal diligence, which the other legatees neglected, in not bringing their bill in time, before the *devastavit* of the executor; whereas, if they had commenced their suit before the commission of the waste, they might have obtained the same success." To these observations, may be added the case of—

Walcott v. *Hall*,(*l*) in which *A.* was entitled to a legacy of 50*l.* payable at twenty-one, or marriage, with interest in the intermediate period. The executor proved the will; and, after retaining the 50*l.* for *A.* when he attained the above age, or married, he paid the surplus of the testator's personal estate to the residuary legatees, as directed by the will. During *A.'s* minority, the executor became a bankrupt, and obtained his certificate. *A.* having attained twenty-one, filed a bill against the executor and the residuary legatees for the legacy of 50*l.* insisting, that if the certificate were a bar to his

(*h*) See *Noel* v. *Robinson*, 1 Vern. 90 & 94. Ed. by Raithby, see also 2 Ves. sen. 194.
(*i*) 2 Ves. sen. 194.
(*k*) Anon. 1 P. Will. 495. and see 1 Vern. 94.
(*l*) 2 Bro. C. C. 305.

demand against the executor, he was entitled to have it paid by the residuary legatees. The *Master of the Rolls* having decided, that the certificate was a bar to the claim against the executor, said, the residuary legatees could not be liable, and (*as reported*) that if they had filed a bill for the residue, the Court would have ordered it to be paid, without any appropriation of the legacy of 50*l.*; and that the residuary legatees had received no more than what they were entitled to.

The remarks to be made upon the last case are these: that since the residuary legatees received no more than what they were entitled to, the executor's payment was perfectly fair, and no *devastavit;* which circumstance, together with the original sufficiency of the assets to satisfy all demands upon them, took away all equity from the particular legatee to call upon the residuary legatees to answer for the executor's misapplication of the 50*l.* And with respect to the observation attributed to the *Matesr of the Rolls*, by Mr. *Brown, viz.* that in a suit by the residuary legatees, the Court would have ordered payment of the surplus without an appropriation of the particular legacy its accuracy may be doubted; as it is presumed, that the Court would have taken care of the infant's legacy by securing it in the usual manner.

4. The remaining subject for consideration in this section is, whether in instances where the legatees are under the necessity of refunding, they will be required to return principal only, or principal with interest?

The rule applicable to this subject was stated by Lord *Eldon* in *Gittins* v. *Steele.*(*m*) "If (said his Lordship) a legacy have been erroneously paid to a legatee, who has no farther property in the estate; in recalling that payment, I apprehend that the rule of the Court is, not to charge interest; but if the legatee is entitled to another fund making interest in the hands of the Court, justice must be done out of his share."

In the case referred to,(*n*) a legacy of 7000*l.* was improperly paid out of the personal, instead of the real estate, the latter being made primarily liable to that bequest by the will. The legatee was also one of the three residuary legatees, and the personal estate was in the hands of the Court of Chancery, producing interest. A question arose between the other two residuary legatees and the particular legatee, whether the latter (he being also a residuary legatee) should be charged with interest upon the 7000*l.* erroneously taken out of the personal assets? And Lord *Eldon* decided in the affirmative, upon the distinction before stated.

(*m*) 1 Swanst. 200. (*n*) Ibid. 24. 199

CHAPTER VIII.

Of Lapsed Legacies.

SECT. I. Of the lapse of an individual Legacy by the death of the Legatee during the life of the Testator.

1.—*When the bequest lapses, although made to the legatee,* his executors, administrators, *or* personal representatives.

2.—*Of the admissibility of* parol evidence *of the testator's intention that the executors, administrators, or personal representatives were meant to take if the legatee died before him.*

3.—Exceptions *to the rule of lapse, when the legacy is given to the executors, administrators, or personal representatives of the legatee.*

SECT. II. Of lapse (where the person named in the will is debtor to the Testator) depending upon the circumstance whether the benefit be given as a *Legacy,* or intended in the nature of a *Release.*

SECT. III. Effect of the death of Legatees before the testator upon the interests of persons in remainder, when the Legacies are limited over upon the happening of particular events.

1.—*Of lapse, when a legacy is given for a* particular purpose, *with a bequest over. if the legatee die before the object be accomplished; but he lives to complete the purpose, and dies during the life of the testator.*

2.—*Of lapse, when the* event *upon which a legacy is given over* happens *in the testator's life-time, and the legatee dies before him.*

3.—*Of lapse, when the legatee dies before the testator, and* prior *to the event happening upon which the legacy is limited to another person.*

SECT. IV. Of lapse of Legacies given to persons in JOINT-TENANCY, or as TENANTS IN COMMON.

1.—*In joint-tenancy.*

2.—*As tenants in common—and*

1.—*When given to* children.

2.—*When with a limitation over to* survivors,—*And*

3.—*Of lapse of* accrued shares.

SECT. V. Of lapsed Legacies, when the bequests are made under POWERS.

SECT. VI. Of the persons entitled to lapsed Interests.

1.—*When the subjects are general legacies or personal residues.*

2.—*When they are legacies payable out of lands, or the proceeds of lands directed to be sold.*

SECT. I. Of the Lapse of an individual Legacy by the death of the Legatee during the life of the Testator,—And—

1. WHEN the bequest lapses, although made to the executor or administrators, or the personal representatives of the legatee.

No rule is more clearly established than that a testamentary disposition must lapse by the death of a legatee during the life of the testator. And it will not vary the rule, although the bequest be made to the legatee, his *executors* or *administrators;* for such words are of no importance, inasmuch as those persons would have taken the legacy in succession and by representation, if it had vested in the legatee, whether expressly named by the testator or not; but since the legatee's death before the testator, prevented his ever taking any interest in the bequest, it follows that his executors or administrators can, by no possibility, make a title to that which never vested in the testator. This is the principle of the rule, which equally applies to devises of real, as to bequests of personal estate; so that if lands were devised to *A.* and his *heirs*, and he died before the devisor, leaving an heir living at the death of the testator, the heir could not make a title to the estate; because he was intended to take it in succession as representative of the devisee, but which was impossible from the accident of the latter dying before the devisor; an event that prevented the devisee taking any interest in the property transmissible to his heir.(*a*) These must be admitted to be hard cases, and are probably contrary to the intention of testators; but as the rule is clear, a court of equity requires an equally manifest intention of testators, that their legal representatives were not meant to take by representation, but as purchasers in their own rights.

A leading case upon this subject is *Elliot* v. *Davenport*,(*b*) in which *B.* being indebted to *A.* in 400*l.* by recognizance, *A.* bequeathed to him, his *executors*, *administrators*, and assigns, the 400*l.* which he owed her (the testatrix,) with all interest due for the same; provided he paid out of that sum several legacies to his children, amounting to about 150*l.*; and the remainder of the money the testatrix gave to *B.* his *executors*, *administrators*, and assigns. The testatrix desired her executors not to claim or meddle with the 400*l.* but freely to deliver up the security for the same into the hands of *B.*, his executors, administrators, and assigns, and to seal and execute to him and them such reasonable releases and discharges, and acknowledge satisfaction for the 400*l.* for the safety of *B.* &c., as *B.* &c. should think proper. *B.* died before the testatrix, and the plaintiff, the heir of *B.*, filed the bill against the executor of the testatrix to be discharged from the recognizance; upon which a question arose concerning so much of the 400*l.* as was given to *B.*, *viz.* whether it was not a lapsed bequest. And Lord *Cowper* determined in the affirmative, in conformity with the rule before stated; and he considered the direction to the executors to deliver up the security, &c. to the legatee, as ancillary to the bequest, and merely legatory, and therefore insufficient to convert the case into an exception to the general rule.

The reporter observes, in a note to the last case, that the opinion of the Master of the Rolls was different from Lord *Cowper's* deci-

(*a*) *Brett* v. *Rigden*, Plowd. 340. (*b*) 1 P. Will. 83.

sion, and that Lord *Cowper* even said it was a doubtful case. Yet it would seem, for the reasons before detailed, that the decree is founded upon solid principle; and its authority has been admitted by subsequent cases.(*c*)

Since then a legacy to *A.*, his executors or administrators, will, as we have seen, lapse by his death before the testator, so will a legacy given to *A.* and his *personal representatives;* for in each case the additional words are unnecessary,(*d*) and merely express what the law would have directed if the testator had been silent on the subject; viz. that if *A.* survive the testator (an event which the gift implies, since no testator could be supposed to mean to give to any but those persons who shall survive him,) and afterwards die before the legacy becomes payable, his personal representative shall receive it. Hence it appears that the mere naming of the executors, administrators, or personal representatives of *A.* is not inconsistent with the rule before mentioned respecting the lapse of legacies, and does not unequivocally show the testator's intention to substitute those persons in the place of *A.* in the event of *A.'s* death before him.

The rule in regard to lapse will equally apply, although the legacy be not immediate, but expectant upon a life interest, and the form of bequest be to the legatee, or his executors or administrators, or to his personal representatives; because the testator may have merely intended to provide against the death of the legatee between his own decease and that of the tenant for life. Since, therefore, there is a period to which the gift to the executors or administrators or personal representatives of the legatee may refer, without interfering with a lapse in the event of his death before the testator, the intention on the part of the latter to provide against that contingency, is not sufficiently certain to counteract the general rule; so that if the legatee die during the life of the testator, his legacy will be lost.

This point was determined by Lord *Alvanley* in the case of *Corbyn* v. *French*,(*e*) in which the testator gave his residuary estate to trustees, to place at interest, and directed them to pay that interest to his wife for life, and at her death 2000*l.* (part of the capital) to his niece *B.* "or to her proper representative," *if she should not be living at his wife's decease.* The testator also gave to each of his sisters' children (naming them) "or their representatives or representative," 2000*l.* (other part of the capital.) *John*, one of the children, died before the testator; and the question was, whether his legacy lapsed or belonged to his representatives? And Lord *Alvanley* determined it was lost for the reasons before stated; his Honour observing, "that the question could be hardly raised upon the will; for (said he) look at the preceding legacy to *B.* Would it not have lapsed if she had died before the testator? Beyond all question it would have done so. It is nothing more than saying the legacy shall go to her representatives if she die before the wife. And as to the other legatees, it is nothing more than a gift to them at the wife's death, which was only intended as a *beneficial* interest to them, and as such must vest in them before it could be transmissible. It is

(*c*) See *Toplis* v. *Baker*, 2 Cox, 122. *Pickering* v. Lord *Stamford*, 3 Ves. 493. *Corbyn* v. *French*, 4 Ves. 435. *Maybank* v. *Brooks*, 1 Bro. C. C. 84. *Hutcheson* v. *Hammond*, 3 Bro. C. C. 129. 143. (*d*) 4 Ves. 435.

(*e*) Ibid. 418. 435. and see *Hutcheson* v. *Hammond*, 3 Bro. C. C. 129. 143. *S. P.*

perfectly clear that where the fund is given to one *for life*, and after the death of that person to several others, and in case of their death *to their representatives*, there is no reason to presume an intention that it shall not lapse by the death of the legatee in the life of the testator."

Thus in *Bone* v. *Cook*,(*f*) the testatrix devised and bequeathed the general residue of her real and personal estate to trustees, in trust to sell and invest the produce in the public funds, &c. and pay the interest to *Sarah Jelly* for life, and after her death (as to one moiety) to pay the same unto and between the two children of *Elizabeth Bone*, deceased, equally; and in case of the death of any of the said legatees before their legacies should become payable, then that the legacy of each of them so dying should go to and be paid amongst his, her, or their children, share and share alike; and in case of such decease of any of the said legatees without having a child or children, the legacy of him or her so dying should go to his or her executors or administrators as part of his or her personal estate. One of the children of *Elizabeth Bone* died in the testatrix's lifetime, unmarried. It was held, that the legacy of such child lapsed; the intervening provision (substituting the children of the legatee) affording no reason for presuming an intention that the legacy should not lapse.

The principle of the last cases equally applies where the payment of the legacy is postponed to the expiration of a year, or of a longer period, after the testator's death; for, in such instances, the substitution of executors, administrators, or personal representatives in the places of the legatees may be intended to provide against the death of any of them after the decease of the testators, and before they become entitled to receive the legacies: a construction quite consistent with the rule of lapse in the event of any of the legatees dying during the life of the testators.

It follows, therefore, that if legacies be given to *B.*, *C.* and *D.*, and directed to be paid to them or to their several executors, or administrators, or personal representatives, or "*heirs*," a term synonimous with personal representatives, at the end of a year after the testator's death, and *B.* die before the testator, the legacy intended for him will be lapsed.

This point was so adjudged in the case of *Tidwell* v. *Ariel*,(*g*) in which the Court acknowledged the principal before stated, in observing, that "payment to the representative at the end of a year after the testator's death, if the legatee be not then living, is not inconsistent with a personal gift to the legatee."

2. It has indeed been attempted to introduce *parol* evidence of the testator's intention to substitute the executors or administrators of the legatee in his place, in order to prevent the lapse occasioned by his death before the testator. But the Court of Chancery rejected such testimony.

Accordingly, in *Maybank* v. *Brooks*,(*h*) the testator (whose father was indebted to *Maybank*) left a legacy of 850*l.* of equal amount with the debt, to *Maybank*, his *executors*, *administrators*, or *assigns*. At the time of the gift of this legacy, *Maybank* was dead, but no notice of the circumstance was taken in the will. The personal re-

(*f*) M'Clel. Exch. Rep. 168. 13 Price, 332. and see Chap. II. s. 8.
(*g*) 3 Mad. 404. 409.
(*h*) 1 Bro. C. C. 84.

presentative of *Maybank* filed a bill for the legacy, insisting that the words "his executors, administrators, or assigns," made it transmissible; and were of the same import as if the testator had said, "and if *Maybank* shall be dead, I give the same to such person or persons as shall be executor, administrator, or assign;" and that the testator intended the legacy to go to *Maybank's* family in payment to him of the debt from the testator's father. To establish this case, the plaintiff proposed to read *parol* evidence of the testator's knowledge that *Maybank* was dead, and of his *intention* that the legacy should go to his representative. But Lord *Thurlow* rejected it, remarking that all the cases of the admission of parol evidence were short of the present; and he noticed its inefficacy, if received, in saying, "the only fact to which evidence was offered appeared to be that the death of *Maybank* was within the *knowledge* of the testator; and in order to show his intention that the legacy should be *transmissible*, which could not be from a legatee who had been dead several years." Hence it appears, that whether the evidence were admitted or not, it was equally useless to the plaintiff. The legacy was declared to be lapsed as falling within the rule before stated.

3. The rule, however, like all others, admits of exceptions, but which must be founded upon the manifest intention of testators, that the legacies should not lapse by the deaths of the legatees before them, and the appointment of other persons to take the legacies upon the happening of those events; for Lord *Hardwicke* was of opinion, that without such a nomination, intention alone would be insufficient to prevent the application of the rule. In *Sibley* v. *Cook*,(*i*) his Lordship thus expressed himself: "If a man devise real estate to *J. S.* and his heirs, and signify or indicate his intention, that if *J. S.* die before him the devise should not lapse, yet, unless he nominated another devisee, the testator's heir is not excluded, notwithstanding that declaration: so in the gift of a personal legacy to *A.*, although the testator showed an intention that the legacy should not lapse if *A.* die before him, yet that is not sufficient to exclude the next of kin." To a similar effect were the expressions of the Lord Chief Baron of the Court of *Exchequer*, in the case of *Toplis* v. *Baker*.(*k*) His Lordship, in allusion to the last case, and that of *Elliot* v. *Davenport*, requiring the will to be *specially penned* to prevent a lapse, said, "If this mean, that some other person must be substituted by the will in the room of the legatee dying, then I think that is a clear proposition; but I doubt whether any thing else will do. Put the case of a testator saying, 'I give to *A.*, and if *A.* shall die before me, yet I do not mean the legacy shall lapse,' I do not know how to prevent this legacy from lapsing; but if the testator had said, 'if *A.* shall die, I mean his *executors* shall take it,' then I understand the effect very clearly; the executors being specially mentioned, and substituted for the legatee."

Upon such reasoning as the above, Lord *Hardwicke* determined the case of *Sibley* v. *Cook*,(*l*) in which *A.* bequeathed in the following words: "I give the several legacies and sums following, which I will shall be paid to the several persons hereinafter named, and if any of those persons die before the same become due and payable, I

(*i*) 3 Atk. 573. (*k*) 2 Cox, 121. (*l*) 3 Atk. 572.

will that they or any of them shall not be deemed lapsed legacies." The testatrix then particularised the several legatees, and proceeded thus: to *Ann* the wife of *R. Wensley*, and *to her executors or administrators*, I give the sum of 50*l.*" *Ann* died before the testatrix, and her husband administered to her. The question was, whether the legacy lapsed in consequence of that accident? And Lord *Hardwicke* determined in the negative, and said, "that the testatrix expressly provided against a lapse if *Ann* died before her; for she says, if any of the legatees die before their legacies become due and payable, I will that they or any of them shall not be deemed lapsed legacies. And subsequently to this the testatrix bequeaths to *Ann*, and *to her executors* and *administrators*, 50*l.*; so that in case of her death before the testatrix, other persons are named to take."

The last authority may seem at the first impression to militate in principle against the before stated case of *Elliot* v. *Davenport*; but upon more mature consideration, their seeming inconsistency may be reconciled. It will appear from an attentive perusal of *Sibley* v. *Cook*, that the testatrix did not insert the terms "executors or administrators" as usual words of annexation, but descriptive of a class of persons distinct from *Ann Wensley*, who were to take the legacy upon her death in the lifetime of the testatrix. For the testatrix having expressly declared that none of the legacies should lapse, proceeded *eodem flatu* to give the legacy to *Ann*, her "executors or administrators;" with the intention of substituting them in *Ann's* place upon the happening of the event which she first described. But in the other case, as also that of *Maybank* v. *Brooks*, before stated(*m*) no such inference of intention could be raised from any expressions used prior or subsequently to the bequests to the legatees their "executors or administrators;" which latter words seem to have been introduced without any particular meaning, and purely as customary expressions.

Consistent with the decision in *Sibley* v. *Cook* is that of *Bridge* v. *Abbott*,(*n*) wherein the words "legal representatives," were used instead of "executors or administrators." In that case the testatrix bequeathed the residue of her personal estate to several persons in equal shares, "but in case of the death of any of them before her, she directed that the shares of those dying should go to, be had, and received by his or her *legal representatives*." One of the legatees died before the testatrix, and Lord *Alvanley*, M. R. after observing that nothing was more clear than that a testator might prevent a legacy from lapsing, and the necessity, according to *Sibley* v. *Cook*, not only that he should declare the legacy should not lapse, but also who should take in the place of the legatee, decreed that the present bequest did not lapse, but belonged to such persons as were the next of kin to the residuary legatee *at the death of the testatrix*.

If a legacy be so given as to be payable at the testator's death, the period of a receipt not being expressly postponed by him, and if the form of bequest be to the legatee *or* his personal representatives, it is presumed that the legacy will not lapse by his death before the testator, and for these reasons: there is no period at which the representatives can take, as intended by the will, except in consequence of the legatee dying in the lifetime of the testator. The testator's

(*m*) *Ante*, p. 322. (*n*) 3 Bro. C. C. 224.

intention, therefore, in naming the representatives must have been to guard against a lapse by the death of the legatee before him. The intent is as manifest as if actually expressed; and since persons are designated to take the legacy upon the happening of that contingency, there is an union of the two circumstances, which (as we have seen) are required and are sufficient to prevent the lapsing of a legacy. In *Corbyn* v. *French*,(*o*) although Lord *Alvanley* avoided a decision upon the question, as not being necessary, it may probably be inferred from his expressions, that his opinion was in favour of the rights of the representative. The same observation applies to the language of *Wright*, J. in *Stone* v. *Evans*,(*p*) but in *Tidwell* v. *Ariel*,(*q*) the Court was more explicit in declaring its opinion in favour of the representative.

Another exception to the general rule applicable to lapses, is where the legacy is given to a trustee for another person; for if the bequest were made to *B.* in trust for *C.*, and *B.* died before the testator, leaving *C.* who survived the testator, the trustees' death would not be permitted to prejudice *C.*, but *C.* would be entitled to the legacy. And the equity is the same, although the trust be not distinctly expressed, but is created by construction of law.

Thus, in *Eales* v. *England*,(*r*) the testatrix gave to *B.* 300*l.* with a declaration of her will, that "*B.* should give the 300*l.* to his daughter *C.* at his death or sooner, if there were occasion for her better preferment." *B.* died before the testatrix, when *C.* survived; and the question was, whether the legacy lapsed? The Court declared, that by the effect of the above form of bequest, *B.* was a trustee for *C.* whose interest could not be affected by the death of the former during the life of the testatrix. And the bequest was compared to one made in the following terms, *viz.* to *B.* for life, then to *C.* in which case *C.'s* title could not be disputed.

So also it will be if lands or personal estate be devised to *B.* charged with a legacy to *C.*, for although *B.* died before the testator, an event by which the bequest is lapsed, so far as *B.* is concerned, yet the charge in favour of *C.* will be supported in a court of equity.

An instance of this kind occurred in the case of *Wigg* v. *Wigg*,(*s*) in which the testator *Wigg* devised real estate to his second son *Thomas*, upon condition that he or his heirs paid to the testator's six grandchildren 90*l.* in equal shares, to whom were given powers of entry and distress in case of non-payment. *Thomas* died before the testator, and consequently the devise of the land lapsed. But the question was, whether the charge of 90*l.* nevertheless subsisted? And Lord *Hardwicke* decided in the affirmative, and directed the estate to be sold to raise the money for the legatees.

SECT. II. Of Lapse, (where the person named in the will is debtor to the testator,) depending upon the circumstance, whether the benefit be given as a *legacy*, or intended in the nature of a *release*.

(*o*) 4 Ves. 435. (*p*) 2 Atk. 87. (*q*) 3 Mad. 409.
(*r*) Pre. Ch. 200. and see *Maggridge* v. *Thackwell*, 1 Ves. jun. 465. 475.
(*s*) 1 Atk. 382. and see *Oke* v. *Heath*, 1 Ves. sen. 135. 141. stated *infra*.

With respect to the doctrine of lapsed bequests, a distinction prevails when the bequest is intended to operate in the nature of a release, or in extinguishment of a debt, and when as a mere legacy. In the latter case we have seen, from the authorities before produced, that in general the legatee's death, during the life of the testator, will defeat the bequest, but in the former a court of equity will carry into effect the testator's intention against all persons except creditors.(*t*) It follows from this distinction between a legacy and a testamentary act in the nature of a release, that in order to decide whether the will be a discharge to a debtor-legatee's estate, although he die in the testator's lifetime, it is necessary to ascertain whether the benefit was meant as a legacy, or a mere direction to the executor to deliver up the security or to cancel the obligation, or whether it amounts to a declaration by the testator of his intention that the debts should not be claimed from his debtor personally, or from his estate. For if the benefit appear to be intended as a legacy, *personal* to the debtor, and the direction as to the delivery of the security is merely *ancillary* to that legacy, the death of the debtor before the testator will occasion a lapse, and the debt will be recoverable by the testator's executors. But if, on the contrary, the testator merely treat the debt as subsisting, and do not purport to *bequeath* or *give* it to the debtor, but uses words of forgiveness or *remission*, it will be presumed that the testator meant *in all events* to cancel the obligation; an intention which will be effectuated by a court of equity, and which the death of the testator will not be permitted to disappoint.

Of the FIRST distinction, the case of *Elliot* v. *Davenport*, before stated(*u*) is an instance, for there the debt of 400*l.* was expressly bequeathed to the debtor, *charged* with a legacy of 150*l.* and the testator did not intend the security to be delivered up under the general direction, until the 150*l.* were paid. Such delivery therefore, and remission of the debt was not distinct from, but *ancillary* to, the bequest of it before made.

The case of *Toplis* v. *Baker*(*x*) next followed, in which the testator gave to one *Draper* 400*l.* that the latter owed him upon a mortgage. He then ordered his executor "to give up to *Draper* all bonds owing from him to the testator, and which should be found in the testator's possession at his death, with all interest due thereon." It appeared that *Draper* had executed a bond as a collateral security, and was also indebted to the testator by another bond, though it seems that the Court's attention was solely drawn to the bond and mortgage, which formed one security. *Draper* died before the testator, and the question was, whether this was a lapsed bequest? The Court of exchequer determined in the affirmative, upon the ground, that the benefit intended for *Draper* operated as a *legacy* by the word "give," and that such was the intention appeared from the direction to the executor as to delivering up the bonds, which was to be to *Draper personally*. So that *Draper's* interest being purely testamentary and personal, and the order for delivery of the bonds being consequential and ancillary to the bequest, the

(*t*) See chap. XIV. sect. 1. and chap. XVII. sect. 4. (*u*) *Ante*, p. 320.
(*x*) 2 Cox, 119. 121.

Court considered the case the same in substance with *Elliot* v. *Davenport*,(*y*) and therefore made a similar decree.

Of the SECOND distinction, the case of *Sibthorp* v. *Maxom*(*z*) is an example. The testatrix bequeathed in the following terms: "I forgive my son-in-law *Chillingworth* a debt of 500*l.* due to me upon bond, and all interest that shall be due from the same at my decease, and desire my executor to deliver up the bond to be cancelled." The legatee died before the testatrix, and the question was, whether, under the above form of bequest, the debt was subsisting, although *Chillingworth* died before the devisor? Lord *Hardwicke* decided that the debt was discharged according to the distinctions before stated.

The remarks which occur upon perusal of the last case are these; that the whole testamentary clause is one of remission and not of gift. It is neither more nor less than an intended release or extinguishment of the debt, at all events. In the same sentence that the debt is forgiven, the security is directed to be delivered up; and not to the debtor personally, but the surrender was to be made generally, so that his representative was within the terms of the order.

It was in fact, a plain declaration, that neither the debtor nor his estate should ever be called upon to pay, nor the estate of the testator receive the money due from the former to the latter. Lord *Hardwicke*, in his judgment, marks the differences between this and the case of *Elliot* v. *Davenport*, in the following terms:

"In *Elliot* v. *Davenport*, the words are not penned as *forgiveness* or *remission*. There was no intention to release the recognizance, until *B.* paid 150*l.* out of the money secured by it; but here is a clear intention to release the debt. There it was to be delivered up to *B. here* in general, to be cancelled. *There*, the right of action subsisted, which was the reason of that opinion; *here*, it would be too nice to make such a distinction, which would too much circumscribe the bounty that was intended by the testatrix for her family." His Lordship also observed, that, "had it been said in *Elliot* v. *Davenport*, 'I *forgive* my son such a debt,' and the bond had been ordered to be delivered up by the executor to be cancelled; it would have been held a discharge; and that there was nothing *personal* in the present case, in the direction that the bond should be delivered up to be cancelled."(*a*)

SECT. III. Effect of the death of legatees before the testator, upon the interests of persons in remainder, when the legacies are limited over upon the happening of particular events.

In treating upon the effect of a legatee's death before the testator, on the interest of persons in remainder, it is proposed to consider the subject—

1. Of lapse, when a legacy is given for a particular purpose, with a bequest over, if the legatee die before the object is completed, but he lives to accomplish the purpose, and then dies during the life of the testator.

It it settled, that conditional limitations are never to be extended

(*y*) *Ante*, p. 320. (*z*) 3 Atk. 580. (*a*) See 2 Cox's Rep. 121.

beyond what is absolutely necessary from the context of the will. It is a consequence of this doctrine, that if a legacy be given to *A.* to defray the expense of building a house, which *A.* intends to erect at *B.*, and in the event of *A.'s* death, before the house be built, the legacy is given to *C.*, if *A.* complete the building, and die during the life of the testator, *C.* cannot claim the bequest, because the legacy was only given to him if *A.* died before the building of the house, a contingency which did not happen. The legacy therefore lapses by the death of *A.* in the lifetime of the testator.

The case of *Humberstone* v. *Stanton*,(*b*) was decided upon this principle. The testator bequeathed to trustees 750*l.* three per cent bank annuities, for his wife for life, with a direction to sell the fractional 50*l.* to place out his son *Joseph* an apprentice. He then gave 450*l.* of the annuities, or 400*l.* (if the 50*l.* had been applied as above) after his wife's death to *Joseph*, upon completing his apprenticeship. The intermediate dividends to be applied for his support and clothing, until his service expired. But if *Joseph* died before the completion of his apprenticeship, he gave the annuities to his other children *nominatim*, or to such of them as should be living when the contingency happened. After the date of this will, the testator placed *Joseph* an apprentice; who, having completed the necessary term of service, died before the testator. The question was, whether the legacy lapsed, or belonged to the other children under the executory limitation? And Sir *William Grant*, M. R. determined that as the legacy was disposed of in the event only of *Joseph's* death, before finishing his apprenticeship, the substituted limitation was disappointed, and a lapse necessarily ensued by the death of *Joseph* before the testator.

2. The principle of the last determination applies to all those cases in which distinct legacies,(*c*) are given over upon events which happen during the testator's life, and the persons to whom the bequests are first made, die before the testator. For since the executory limitations are made expressly to depend upon the not happening of the events described: if they occur while the legatees live, and they die either before or after the testator, it is clear from the terms of the will, that the executory limitations cannot take place; the contingencies upon which they were to arise never having had existence. The testator's intention may sometimes be defeated by the construction, but it is his own fault as *quod voluit non dixit;* and it is more eligible that a private inconvenience should be tolerated, than a certain known rule of construction be infringed, and a court of justice assume the power, on mere conjecture, to make a codicil to the will. In these cases, therefore, the legacies lapse. In illustration of these remarks, we shall produce two instances where the happening, in the testator's lifetime, of the events in which the legacies were given, occasioned those legacies to lapse by the deaths of the legatees before the testators, notwithstanding the executory bequests of the legacies to other persons.

In *Calthorpe* v. *Gough*,(*d*) 10,000*l.* were bequeathed in trust for the separate use of Lady *Gough*, and if she died before her husband,

(*b*) 1 Ves. & Bea. 385. (*c*) See sect. 4. "Joint tenancy," p. 330. in exception
(*d*) 3 Bro. C. C. 395. note. 1 Ves. & Bea. 389.

then according to her appointment; and if she made none, the money was to go among her children, but if she survived her husband the whole was to belong to her. The event in which the children were to take did not happen; that in which she was to take absolutely occurred, but she died during the life of the testator. And it was decided that the legacy lapsed.

So also in *Doo* v. *Brebant*,(*e*) a legacy was given in trust for *Sarah Counsell* until she attained the age of twenty-one, with a direction for the transfer of it to her at that time; but, in case she died *under* twenty-one, leaving children, then in trust for them, and if she died *under* that age without leaving a child or children, or, there being any, if all of them died under twenty-one, the legacy was given to other persons. *Sarah attained the age of twenty-one*, married, and had children; but she died *before* the testatrix, leaving two infant children. It appears from Mr. *Brown's* report of the case, that Lord *Thurlow* disapproved of the last, and inclined to the opinion, that upon the principle of *Jones* v. *Westcomb*,(*f*) and other cases of that class, the children should be permitted to take; but he sent a case to the Court of *King's Bench*, which held with great clearness, that the children could not take any thing. On which occasion Lord *Kenyon* said, "if this event had occurred to the testatrix, most probably she would have provided for it, and given the money to the grand-children; but as she has not done so, we cannot make a will for her." The legacy therefore lapsed, and in consequence of the opinion of the court of law the Lords Commissioners of the Great Seal afterwards dismissed the bill of the children claiming the legacy.(*g*)

In the cases just discussed, the lapse was occasioned by the deaths of the legatees in the lifetime of testators, where the events upon which the legacies were given happened during the joint lives of the legatees and of the testators; and which would have entitled the former to the bequests absolutely, had they survived the latter. It remains to consider,

3. Whether, if the events upon which the legacies were limited over had not happened during the lives of the legatees, those legacies would lapse to the prejudice of the persons in remainder, by the deaths of the legatees before the testators? But since the cases determined upon the subject have been generally on questions between tenants in common, founded on limitations to the survivors in the event of any of them dying under the age of twenty-one, the reader is referred to the next section. Suffice it to remark in this place, that it seems formerly to have been a question whether a bequest over in case of the death of the legatee before the arrival of a certain time, could take effect when he died during the testator's life, although before the period specified. It is, however, now settled, that in such a case the bequest over is effectual, and no lapse occasioned by such a death. So that if a legacy were given to *A.* payable at twenty-one, and if he died under that age, then to *B.*;

(*e*) 3 Bro. C. C. 393. 4 Term. Rep. 706. 1 Ves. & Bea. 389.
(*f*) Pre. Ch. 316.
(*g*) See the next section under "Joint tenancy," and Chap. XIII. sect. 1. also *Doe* v. *Shipphard*, Dougl. 75. *Williams* v. *Jones*, 1 Russ. 517.

should *A.* die before twenty-one in the lifetime of the testator, the legacy would not lapse, but *B.* would be entitled to it.(*h*) The principle is obvious. The event upon which the executory limitation was to take place has happened, *i. e.* the death of *A.* under twenty-one. That death was not required to be after the demise of the testator, so that a death at any period before twenty is within the terms of the will, and doubtless according to the intention of the testator.

Having in the preceding sections treated of the lapses of legacies given to persons singly and individually, the subjects proposed to be next considered are,—

Sect. IV. Of Lapses, when Legacies are given in Joint tenancy, or in Tenancy in common. And

1. Of bequests in joint tenancy.

If a legacy be given to two persons *jointly*, although one of them happen to die before the testator, or notwithstanding the testator revoke the interest originally intended to be given to either of them; such interest will not be considered lapsed or undisposed of, but will survive to the other legatee. This exception to the general rule relating to lapsed legacies, originates in the nature of the interest which joint legatees have in the fund; for they do not take it *per mis* only, like tenants in common,(*i*) but *per mis et per tout*. With this agrees the observation of *Bridgman*, Ch. J. in *Davis* v. *Kemp*,(*k*) "that each is a taker of the whole, but not solely; for the whole is devised to both, and not a moiety to each." If then upon any event one of the two legatees be deprived of taking the benefit intended for him, the interest of his companion, which extended *per tout*, and was undivided, becomes absolute in the whole fund.

In *Buffar* v. *Bradford*(*l*) the testator gave four of eight parts of his residuary personal estate "to his niece *Buffar*, and the children born of her body." The niece had no child when the will was made, but one (the plaintiff) was afterwards born, and during the life of the testator, and the niece died before the testator. Lord *Hardwicke* determined that the niece and child would have taken in joint tenancy had the former lived, but as she died in the testator's lifetime her child should take the whole.

So in the case of *Humphrey* v. *Tayleur*,(*m*) *A.* bequeathed the residue of her real and personal estate to *Tayleur* and *Wauchope*, whom she appointed executors. *A.* afterwards, by a codicil, revoked the nomination of the latter as executor, and what was given to him by the will. Lord *Hardwicke* decided the effect of revocation to be, to give the whole residue to *Tayleur*; upon the principle that he and *Wauchope* would have taken the fund as joint tenants by the words of the will, if the bequest to *Wauchope* had not been repealed. Again—

In *Lowset* v. *Sweet*,(*n*) the testator gave 100*l.* part of a mortgage debt, to the son and daughter of *William Wicker*. *Wicker* had four

(*h*) 2 Vern. 207. 611. 1 P. Will. 274. 2 P. Will. 529. 3 P. Will. 113. *Walker* v. *Main*, 1 Jac. & Walk. 1.
(*i*) 3 Ves. & Bea. 54. (*k*) Carth. 3. (*l*) 2 Atk. 220.
(*m*) Ambl. 136. (*n*) Ambl. 175.

sons and one daughter. None of the sons being able to take, from the uncertainty of the one intended, Lord *Hardwicke* decreed the whole legacy to the daughter, observing, that it was a joint devise, and in such a case, by whatever cause it happened that one of the joint tenants could not take, the other should have the whole.

And in *Morly* v. *Bird*,(*o*) the testator bequeathed to the four daughters of his brother *Collins* 400*l.* out of seven, then lying in the three *per cent* consols. Three of the daughters died before the testator, and Lord *Alvanley*, M. R. declared the 400*l.* belonged to the surviving child.

Since then legacies given to two or more in joint tenancy will, on the death of any of them in the testator's lifetime, survive to the other legatees, where the terms of the bequest proceed no farther than to give the joint interests; it may be asked, whether, if a testator add to the gift a declaration, that if any of the joint legatees die under twenty-one, their legacies shall go to the survivors, and one of them *after attaining that age* die before the testator, his interest will lapse and not go over? In the instance of an *individual legatee* with a limitation over to another person, if he die before twenty-one, it has been shown that his death *before* the testator *after* attaining that age, occasions a lapse of the legacy.(*p*) But in the present case, as the legatees are intended to be joint tenants, a character which would entitl ethe survivors to the whole fund, if no limitation over had been inserted, it is presumed, that as such limitation cannot take effect upon the event described, the rights of the legatees are restored to the same state as they would have been in had no such executory bequest been introduced into the will; and, therefore, since the survivors would have taken the whole legacy, although any of them died before the testator, whatever might be the age of the legatee, so in this case they will be equally entitled, although the legatee died after attaining twenty-one.

In instances where executors take the residue in the character of executors, or by a joint bequest, they do so in joint tenancy.(*q*) Consequently, if one or more of them die before the testator, the survivors will be entitled to the whole property, for the reasons before detailed.

Thus in *Frewen* v. *Relfe*,(*r*) the persons whom the testatrix, after various changes, ultimately appointed her executors, were *M. Berry*, *M. Barham*, *L. Relfe*, *P. Frewen*, and *H. Benge*, and no disposition was made of the residue. The two first named executors died before the testatrix, and Lord *Thurlow* determined that the survivors were entitled to the whole of the fund.

2. With respect to legacies given to persons as tenants in common.

1. It is a rule when distinct legacies are given to individuals, or an aggregate fund is directed to be divided among them, *nominatim* in equal shares, their interests are several; and if any of them die before the testator, what was intended for those legatees will lapse into the residue; because the others have no interest in the benefits intended for the deceased legatees, each legatee being solely enti-

(*o*) 3 Ves. 628. 631. (*p*) *Ante*, p. 328.
(*q*) 2 P. Will. 247. 529. 2 Brd. C. C. 25. 9 Ves. 204. 598.
(*r*) 2 Bro. C. C. 220. See chap. XXIV. sect. 2. sub-sect. 9.

tled to his own legacy or proportional share. In this consists the distinction between tenants in common and joint-tenants, and hence arise the different results in regard to lapse. In the one case (as we have seen) the death of one joint tenant before the testator will not occasion a lapse; but in the other, that accident will defeat the legacy, or the share, of the deceased in the aggregate fund.

Accordingly in *Man* v. *Man*,(*s*) the testator, after giving his personal estate to his wife for life or during widowhood, bequeathed it to *A.*, *B.*, *C.* and *D.* his brothers and sisters, in equal shares. *B.* and *C.* died before the testator, and it was determined by Sir *Joseph Jekyll* that those two shares lapsed.

So in *Bagwell* v. *Dry*(*t*) the residuary personal estate of a testator was given to four persons, share and share alike. One of them died during the testator's life, and Lord *Macclesfield* held, that the proportion of the deceased legatee was undisposed of. Again—

In *Page* v. *Page*,(*u*) the bequest of the residue was made to six persons, "to each of them a sixth part." One of whom having died before the testator, Lord *King* decided that his share was lapsed.

Also in *Owen* v. *Owen*,(*x*) a testatrix gave the surplus of her estate to her nieces *Mary* and *Elizabeth*, daughters of Mr. and Mrs. *Owen*, in equal shares. One of the nieces died before the testatrix, and Lord *Hardwicke* determined that her share was undisposed of.

The last case was followed by *Peat* v. *Chapman*,(*y*) in which a similar decision was made by the Master of the Rolls.

And in *Ackroyd* v. *Smithson*,(*z*) the testator, after giving distinct legacies to a number of persons, also gave them his residuary estate (consisting of personal property, and the produce from the sale of his real estate) "in *proportion* to their *several* and *respective* legacies therein to them bequeathed." Two of those legatees died before the testator, and their legacies and shares of residue were determined by Lord *Thurlow* to have lapsed for the benefit of the heir and next of kin of the testator.

The rule relating to interests lapsed by the deaths of legatees during the life of the testator, equally applies to cases where a testator revokes by codicil the benefit intended for one tenant in common, and makes no other disposition of it. And although he confirms the will, still the other tenants in common cannot make a title to the revoked share; because by the will they took no interest in such share, but only in their own several proportions; therefore, since the confirmation of the will had no other effect, than to make it speak from the date of the codicil, no new estate or interest having been given to other tenants in common, it necessarily follows, that, as they, neither under the will or codicil, can take the revoked interest, it is undisposed of, and falls into the residue. In order to exemplify this proposition—

Suppose a testator having children to give his residuary estate among two of his sons and one daughter, as tenants in common, and afterwards to add a codicil revoking the residuary bequests to his daughter, but confirming his will in all other respects. Notwith-

(*s*) 2 Stra. 905. (*t*) 1 P. Will. 700. (*u*) 2 P. Will. 489.
(*x*) 1 Atk. 494. (*y*) 1 Ves. sen. 542. *infra*, Chap. XXIV. sect. 2 sub-sect. 9.
(*z*) 1 Bro. C. C. 503.

standing this act of confirmation, the daughter's proportion of the residue would be lapsed for the reasons before mentioned. So it was determined by Lord *Northington* in *Cheslyn* v. *Cresswell*, and by the House of Lords on appeal from his decree.(*a*) It appears from the report of the arguments of counsel, that this was the point upon which the decision in the House of Lords was founded, although it be observable from the same report that the daughter died before the testator.

1. A distinction however must be noticed between cases where a legacy is given to a *class* of persons in general terms as tenants in common, as to the children of *B*, and those instances in which it appears upon the face of the will that particular objects at the date of it were intended to take the property. In the latter we have seen that the death of one of the legatees before the testator, or a revocation of the bequest to him, will occasion a lapse, but it is not so in the other, since it is presumed that those persons of the described class, who should survive the testator, were the only objects of his bounty; so that if an individual answering the description of the bequest, and who, if living at the death of the testator, would have been entitled to participate in the gift, happen to die before him, that event will not, upon the foundation of the above presumption, occasion a lapse of any part of the fund; but those persons, answering the description at the period of the testator's death, will be entitled to the whole of it. This will be illustrated by the following case:

In *Viner* v. *Francis*,(*b*) the testator gave "to the *children* of his late sister *Mary Crowson* 2000*l.* to be equally divided among them." His residuary estate he bequeathed in thirds, one third to his brother, another third to his sister *Martha*, and the remaining third he gave "to the children of his late sister *Mary Crowson*, equally to be divided between the *children* of his brother *S. Wiggington*, his sister *Martha*, and the *children* of his late sister *Mary Crowson*." When the will was made *Mary Crowson* had three children, *John*, *Elizabeth*, and *William*, but *William* died before the testator, and it was contended that one-third of a third of the 2000*l.* and of the residue bequeathed to the children of *Mary Crowson*, lapsed into the residue by the death of *William* in the life of the testator. But the Court declared the contrary, and that those children of *Mary* living at the testator's death were entitled to the 2000*l.* and the third of the residue.

A case indeed of *Martin* v. *Wilson*,(*c*) is a decision contrary to that of *Viner* v. *Francis*, which was not mentioned or referred to. But upon principle it is conceived that the latter would be followed in preference to the former. The one prevents a lapse without doing violence to the testator's intention or the expressions in his will; whilst the other produces a lapse, by entertaining a construction neither required by the description in the will, nor the clear intention of the testator.

2. Another exception to the rule of lapsing, in consequence of one the legatees dying before the testator, occurs when there is a

(*a*) 3 Bro. Parl. Ca. 246. 8vo. ed. 2 Eden. 123. *S. C.*
(*b*) 2 Cox, 190. 2 Bro. C. C. 658. *S. C.* (*c*) 3 Bro. C. C. 325. Ed. by Belt.

limitation over of the legacy to the survivors generally, or upon the death of any of them under the age of twenty-one. In such instances, it is settled that the limitation to survivors shall have effect during the continuance of the testator's life; so that, in the first case, if a legatee tenant in common die before the devisor, or if in the second, the legatee die in the testator's lifetime *before* attaining twenty-one, or the happening of the event upon which the limitation over is made to depend, the legacy will not lapse, but go to the survivors under the express provision in the will.

Of the FIRST proposition the resolution or assent of the Court in the case of *Northey* v. *Burbage*,(*d*) is an example. *A.* bequeathed 500*l.* a piece to his grandchildren *B.* and *C. and if either of them died* his share was to go to the survivor. *B.* died before the testator, yet it was held that his share did not lapse but went to the other grandchild.

So in *Smith* v. *Pybus*,(*e*) Lady *Fletcher* bequeathed a personal annuity after the death of her father, to be equally divided between her brother and sisters *Charles* and *Catharine Pybus*, and *Martha Briggs*, "to them and their *heirs* or the *survivors* of them, in the order they are now mentioned." *Martha* died before the testatrix, and Sir *William Grant*, M. R. determined the bequest to be of a perpetual annuity, over which the surviving legatees had an absolute power of disposition; and that *Martha's* intended share went over to her brother and sister under the limitation to the survivor. And his Honour rejected the words, "in the order they are now mentioned," as unintelligible and inconsistent with the previous clear expressions in the will.

Of the SECOND proposition, the following authorities are instances:

In *Miller* v. *Warren*,(*f*) the testator gave to the four children of *H. Miller* 1500*l.* a piece (naming them,) to be paid to sons at twenty-one and to daughters at eighteen or marriage; and if one or more of them died before their legacies became due the same were to go to, and be divided among, the surviving legatees. *Mary*, one of the four children died during the life of the testator, and it is presumed before attaining her age of eighteen or being married. The question was, whether the 1500*l.* intended for her lapsed, or went to the surviving children? And it was decreed that the survivors were entitled to it, the Court declaring, that should a legacy be given to *A.* at twenty-one, and if he died before that period then to *B.*, although *A.* died during the life of the testator, yet the legacy should go to *B.*

Also in *Ledsome* v. *Hickman*,(*g*) the defendant's testator gave 300*l.* a piece to *A.*, *B.* and *C.* at twenty-one or marriage, and if any died before, then to the survivor. *B.* died in the testator's lifetime. The question was, whether the 300*l.* lapsed, or went over to *A.* and *C.*? And it was decreed in their favour. Again—

In *Perkins* v. *Micklethwaite*,(*h*) one *Micklethwaite* having two sons, *Thomas* and *Joseph*, and also two daughters, bequeathed 1500*l.* to his younger son *Joseph*, and 1000*l.* to each of his two daughters; and directed that if any of his three younger children

(*d*) Pre. Ch. 470. and see *Barker* v. *Giles*, 2 P. Will. 280. 3 Bro. Parl. Ca. 104. 8vo. ed.
(*e*) 9 Ves. 566.
(*f*) 2 Vern. 207.
(*g*) 2 Vern. 611.
(*h*) 1 P. Will. 274.

died before twenty-one or marriage, his or her portion should go to the survivors, and he gave his real estate to the eldest son charged with those portions. One of the daughters died under age and before marriage, and then *Joseph* died under twenty-one and unmarried, in the lifetime of his father, the testator, who lived to have another son whom he named *Joseph*, upon which occasion he made a codicil and confirmed his will, noticing that since the making of his will another son was born to him, and he therefore gave 500*l.* a piece to his son *Joseph* and his surviving daughter, over and above what he had given them by his will. It being objected that by the death of the first *Joseph* the portion of 1500*l.* intended for him lapsed. Lord *Cowper*, Ch. said, it was improper to call it a lapsed legacy, because it was a portion given over, and should take effect; that the codicil was a republication of the will, and amounted to a substitution of the second *Joseph* in the place of the first, as if the testator had made his will anew, and had written it over again, by which new will the second *Joseph* must take; and that the fixed intention of the testator appeared to be that *Joseph* should have more than his daughter, whereas if the legacy of 1500*l.* should be taken to be lapsed the daughter would have twice as much as *Joseph*.

The last case was followed by *Willing* v. *Baine*,(*i*) in which *A.* bequeathed 200*l.* a piece to his children, payable at twenty-one, and if any of them died before that age, then his legacy was to go to the surviving children. One of the children died in *A.*'s lifetime, and upon a question whether such child's legacy lapsed or belonged to the survivors, it was resolved by Lord *King*, Ch., that although the legacy lapsed *quoad*, the deceased legatee, it was nevertheless well given over to the surviving children.

The principle of the last authorities was adopted by Lord *Thurlow* in *Rheeder* v. *Ower*.(*k*) In that case, the testator, *Mitchell*, directed his trustees to invest his residuary estate in the funds, and to pay the dividends to his five sisters (naming them) in equal shares, during their lives, for their sole use and benefit; and if any of them died leaving issue, then the trustees were "to pay and transfer the share of the residue (to which his sister so dying, was *entitled at* or *before* her decease, *to receive the dividends* thereon) unto and among all such children, or to such child of his deceased sister, equally at their ages of twenty-one:" One of the testator's sisters, named *Ann Holdgate*, died before him leaving children, the plaintiffs, *Rheeder* and *Jennings*, who attained twenty-one, and claimed one-fifth of the residue, notwithstanding the words of the bequest to children, seemed to exclude those of sisters dying during his life; and against the claim it was alleged, that in order to enable children to take under the will, they must be of such sisters as would be entitled to receive the dividends for their lives, which a sister dying before the testator was not. But Lord *Thurlow* thought that the plaintiffs were entitled to the share of their mother, as an executory devise; and that in a will so loosely drawn, it was more probable that such was the testator's intention than the contrary.

The cases which have been produced clearly establish, that when legacies are given to persons as tenants in common, with a limitation

(*i*) 3 P. Will. 113. (*k*) 3 Bro. C. C. 240.

to the survivors, upon the death of any of them under twenty-one, if any of those persons happen to die under that age before the testator, his legacy will not lapse, but survive to his companions, from the effect of the will. The result, however, would be different, if the legatee's death had taken place *after* he attained twenty-one, for the reasons and upon the authorities mentioned in the last section.(*l*)

3. Instances indeed may occur, where legacies are given to persons as tenants in common, with an executory bequest to the survivors, that if two or more of the legatees shall die before the testator; so that it may be necessary to consider, whether the *original* shares only, or the *accrued* as well as the original shares passed to the surviving legatees. But it is settled, that where *distinct* legacies are given to individuals in common, with a limitation to the *survivors*, the original, and not the accrued legacies, will pass to the other legatees; consequently, the latter legacies will lapse by the death of the legatees, who would have been entitled to them, in the lifetime of the testator. Questions of this nature depend upon the sufficiency of the words made use of by the testators to embrace accrued legacies or shares of accrued legacies; and it has been decided, that the term "portion," or "share," will not include them.

Accordingly, in *Perkins* v. *Micklethwaite*,(*m*) distinct legacies were given by the father to his youngest son and two daughters; but if any of them died before twenty-one or marriage, his or her *portion* was to go to the survivors. A daughter died unmarried, and a minor; and then the son died under twenty-one, and without being married. It was one of the questions, whether, upon the son's death, the part of his sister's legacy, to which he would have been entitled, if he had outlived the testator, passed with his original legacy to the surviving daughter? And Lord *Harcourt*, Ch. determined in the negative, because there were not words sufficient to pass the accrued share.

In ex-parte *West*,(*n*) Lord *Thurlow* expressed an opinion, that the word "share," would not pass an accrued interest under a limitation to survivors; and that opinion was confirmed by the decree of Lord *Kenyon*, M. R. in the same matter, in a suit instituted for the purpose of obtaining the solemn decision of the Court upon the question.

An exception to this rule of the lapsing of accrued interests, has been determined to exist, where the legacies are *not distinct;* but an *aggregate* fund is bequeathed to persons in common, with a *limitation* to survivors, and the testator's intention appeared from his expressions, to *preserve* the property in an aggregate state throughout his dispositions of it. The general rule is disapproved of, as in most instances, defeating the intention of testators; but a court of equity considers itself bound to follow it to the extent of its establishment. In the present instance, *Buller*, J. considered the rule to be inapplicable, and decided according to that impression.

The case alluded to is *Worlidge* v. *Churchill*,(*o*) in which *Edward Worlidge* devised to trustees all his real and personal estates, in

(*l*) *Ante*, p. 327. *et seq.* (*m*) 1 P. Will. 274. stated *supra*, p. 334.
(*n*) 1 Bro. C. C. 575. Ed. by Belt. and see Forrest. 124. 3 Atk. 79. 2 Ves. jun. 534. 5 Ves. 465. (*o*) 3 Bro. C. C. 465.

trust, to sell the former, and invest the clear surplus, and his personal estate, in the funds for the benefit of his four children, *Rosalba*, the plaintiff, *Edward*, *William*, and *John Worlidge*, to be equally divided amongst them at twenty-one; but if any died before that age, his or their share or shares were to go to the *survivors* or *survivor*. The testator also directed his trustees to apply the *interest* of such *trust money* during the minorities of the legatees, for their support and education; and, if more than sufficient for that purpose, the surplus was to be invested for their *mutual* benefit. And *if* all of them died under twenty-one, before *Mary Worlidge* (to whom he had given an annuity) the interest of the *trust money* was to be paid to her. And *after the decease of all*, he gave the *trust money* to other persons. *John*, first died a minor, as is presumed, before the testator; and *William* and *Rosalba* died under twenty-one, after surviving the testator, leaving their brother the plaintiff, *Edward*, who, as the survivor, claimed the whole fund, consisting as well of *accrued* as of original shares. And *Buller*, J. decided in favour of the claim; first, because the present bequests were not given as distinct legacies, but as an aggregate fund; and secondly, in consequence of the testator's intention to keep it in that state, which he manifested by applying the words "trust money" not to each child's share, but to the whole fund.

The next subject proposed for consideration is—

SECT. V. Lapsed Legacies when the bequests are made under Powers.

The general rule of equity relating to lapses, is equally applicable, whether the legacy be given under a will made by virtue of donorship flowing originally from the testator, or whether it be given under a *power* created for the purpose; for, in the latter case, although the legatee will take under the *authority* of the power, yet he will *not* be considered as taking *from the time of its creation*, so as to prevent a lapse occasioned by the death of the legatee before the appointor, when the power is executed by will, and for the following reasons. The legatee does not take under the power solely and exclusively, but under it and the will jointly. The will so made, is to be construed and considered like all others. It is, therefore, ambulatory, revocable, and incomplete, till the death of the testator; consequently, no person can take under it, who does not survive him. If, then, an appointee, by will made under a general power, die before the testator, his legacy will lapse in all such instances, as it would do, if the legacy had been given out of the testator's own property, over which he had absolute dominion.

Accordingly in *Oke* v. *Heath*,(*p*) Mrs. *Smith* was empowered, by articles of settlement, entered into upon her marriage with *William Smith*, to appoint by deed or will 4000*l.* to such persons as were or should be her next of kin, in the events of her dying before her husband, and without leaving issue, both of which events happened; Mrs. *Smith* executed her power by will, appointing the 4000*l.* to her nephew, *W. Gill*, he paying out of it an annuity to his mother for life. *W. Gill* died before the testatrix. Lord *Hardwicke* de-

(*p*) 1 Ves. sen. 135. 141.

cided that so much of the fund as was appointed to *Gill* beneficially, lapsed by his death, but not the mother's annuity granted out of it.

The last case was followed by that of the Duke of *Marlborough* v. Lord *Godolphin*,(q) in which the Countess of *Sunderland* was empowered by the will and codicil of her first husband, to appoint 30,000*l.* by deed or will among such of his children as she thought proper; a power which was reserved to the countess previously to her marriage with a second husband. The countess, in exercise of the power, appointed by *will* distinct parts of the fund to *J. Spencer* and Lady *Morpeth*, two of Lord *Sunderland's* children, who died before her; and the question was, whether their legacies did not lapse in consequence of the happening of those events? The solution of which question depended upon the legal effect of a will made in execution of a power. And the clearness with which Lord *Hardwicke* expressed himself will apologize for the adoption of his own words upon so material a subject. "I admit the principle, that, when a person takes by execution of a power, whether it be real or personal estate, it is taken under the *authority* of that power; but *not from the time of the creation* of the power. There is no case that the relation shall go back for that which is quite of another nature, and that is the point which must be contended for here, that they must take by relation, so as to make them take from the time of the creation of the power; for which there is no authority, and that would be unreasonable. The meaning that persons must take under the power, or as if their names had been inserted in it, is, that they shall take in the same manner as if the *power*, and the *instrument* executing it, had been incorporated in one instrument; then they shall take as if all that was in the instrument executing had been expressed in that giving the power. So it is in *appointments* of *uses*. If a feoffment be executed to such uses as the feoffor shall appoint by *will;* when the will is made, it is clear that the appointee, *cestui que use*, is in by the feoffment, but has *nothing from the time* of the execution of the feoffment, so as to vest the estate in him. The estate will vest in him according to the *nature* of the act done, and appointment of the use, from the period of the testator's death. This, therefore, is not a *relation* so as to make things vest from the time of the power, but according to the time of that act executing the power. Not like the referring back in case of assignment in a commission of bankruptcy, for that is by force of the statute, and to avoid *mesne* wrongful acts." An observation which his Lordship applied to the reference of the due enrolment of a bargain sale to the period of the execution of that instrument. He, therefore, decided that the legacies to Mr. *Spencer* and Lady *Morpeth* lapsed by their deaths before the testatrix.

Sect. VI. As to what persons will be entitled to the benefit of lapsed Interests.—And

1.—Of legacies payable out of the personal estate.

When the lapse is of a general or specific legacy, it falls into the general residue, and, consequently, belongs to the person entitled to that fund by the gift of the testator. If, then, a residuary legatee

(q) 2 Ves. sen. 61. 73. and see *Vanderzee* v. *Aclom*, 4 Ves. 771 *Burges* v. *Mawbey*, 10 Ves. 319. 326.

be named, he will take the lapsed legacy in that character.(*r*) But that nomination will not prevent his taking a lapsed bequest by *substitution, i. e.* in the place of the deceased legatee, when the testator shows his intention that the residuary legatee should so take it, and there is no inconsistency between the characters of a residuary and a particular or substituted legatee to prevent it. In fact, the latter title may be more beneficial than the former, upon a deficiency of assets to pay all the debts and legacies; for as residuary legatee, he can claim nothing until all debts and legacies are fully paid; but as a particular or substituted legatee, his right to an equality of payment with the rest is preserved; so that, after rateably abating with them, he is entitled to receive the remainder of the legacy.(*s*)

An instance of a residuary legatee taking by substitution a general legacy, and not as residue, occurred in the case of *Rose* v. *Rose*,(*t*) in which *F. Rose* being domiciled in *Scotland*, and having an only daughter, *Mary*, devised to her all his real and personal estates, subject to debts and several legacies, one of which (a debt owing by his brother *James Rose*) he gave to *James's* children equally; directing "the share of the deceased to fall and belong to his (the testator's) heir under his will." Another legacy was given in trust for the wife of *James Rose;* and one of 1000*l.* to the testator's natural son, *Bernard Rose*, "whom failing, to revert and return to his (the testator's) heir under his will." He also desired that at his wife's death 11,000*l.* three *per cent* stock (in the names of the trustees of his marriage settlement, to secure to his wife a part of her jointure) "should revert and return to his heir under the will;" to whom he further gave 10,000*l.* sterling, free from all deductions. The will then declared the gift of the 10,000*l.* to be in addition to the legacy of the stock; and that in the event of a deficiency of assets to pay legacies, his daughter's fortune should not abate below 10,000*l.* unless she died without heirs of her body; and, in that case, the defect of asset was not to prejudice the other legacies; but that, any legatee dying before him, "his or her legacy should fall, accrue, and belong to his heir before mentioned." *Bernard Rose*, the legatee of 1000*l.*, died before the testator. And the question was, whether that sum lapsed into and formed part of the residue bequeathed to *Mary*, or belonged to her as a particular legatee by substitution in the place of *Bernard?* Sir *William Grant*, M. R., was of opinion, founded upon the language and import of the will, that the testator intended to substitute his daughter, by substantive and independent gifts, in the places of the legatees who might happen to die before him.

But if a testator make no disposition of the residue, and appoint an executor, then, although the executor be entitled to it at law *ex virtute officii*, and also in a court of equity, if there be no circumstance indicating the testator's intention to the contrary (a subject considered in a subsequent chapter;) yet it seems not clearly settled whether that Court will permit him to take lapsed legacies for his own benefit. It may, however, be strongly urged, that the testator, in giving the legacy, sufficiently showed his meaning, that his execu-

(*r*) *Roberts* v. *Cooke*, 16 Ves. 451. *Leake* v. *Robinson*, 2 Meriv. 393. and see 1 Ves. & Bea. 385. (*s*) See Chap. V. sect. 2 p. 253. (*t*) 17 Ves. 347. 352.

tor should not in that character be entitled to so much of his personal estate as was equivalent in amount to the bequest; and, consequently, that the accident which produced the lapse should enure to the benefit of the testator's next of kin.(*u*)

2. The same principle applies to residuary estates. Hence it follows, that if a sole residuary legatee, or one intended to take the residue in *common* with other persons, die before the testator, the lapsed share will belong to the testator's next of kin.(*x*)

3. When legacies are given out of freehold estates, and some of them lapsed by the deaths of the legatees during the life of the testator; to whom these interests belong, has been a subject of litigation between his heir and devisee. The first has claimed them as interests in land undisposed of by the will, and the second has made title to them as parts of the estate which was devised to him. In the settlement of these claims it is necessary to attend to the distinction between a *beneficial* devise of the estate to, or in trust for *A. charged* with particular legacies, and a devise to a mere *trustee* to pay those particular legacies; a devise of lands in trust to sell and pay legacies generally, not being affected (as we have seen) by the death of any legatee before the testator, if the whole fund be necessary to the full discharge of the other bequests.(*y*)

In the first instance, as the estate is effectually devised to *A.* for his own benefit, and he is substituted by the testator in place of his heir, *A.* will be entitled to the same benefits as the heir would have been if no disposition had been made of the land. Upon which principle it is firmly settled (as observed by Lord *Alvanley* in *Kennell* v. *Abbott*,)(*z*) that if an estate be devised *charged* with legacies, which fail; *no matter how*, the devisee shall have the benefit of them.

But this is not so in the second instance, where the estate is devised to a mere *trustee* in trust to sell and pay particular sums of money, as to *B.*, *C.* and *D.*, which lapse by their deaths before the devisor, and no disposition is made of the *extra* produce. For the heir is not disinherited, and he is legally entitled to all such interests in the estate as are not effectually disposed of; consequently, those lapsed legacies will sink into the land for his benefit.(*a*)

4. Questions have also arisen between the heir and residuary legatee, and the heir and next of kin of the testator, in regard to the right to lapsed bequests affecting the real estate; where it and the personal fund were blended and made one and the same for the payment of legacies; and the surplus of the consolidated property was either undisposed of, or bequeathed to *A.* singly, or to *B.* and *C.* as tenants in common.

The solution of these questions depends upon previously ascertain-

(*u*) 1 Atk. 496. 18 Ves. 254, 255. Vide *infra*, Chap. XXIV. sect. 2. sub. sect. 6.

(*x*) *Bagwell* v. *Dry*, 1 P. Will. 700. *Page* v. *Page*, 2 P. Will. 489. *Owen* v. *Owen*, 1 Atk. 494. *Peat* v. *Chapman*, 1 Ves. sen. 542. *Bennet* v. *Batchelor*, 1 Ves. jun. 63. *Ackroyd* v. *Smithson*, 1 Bro. C. C. 503. 515. *Chesslyn* v. *Cresswell*, 3 Bro. Parl. Ca. 246. 8vo. ed. and *Williams* v. *Coade*, 10 Ves. 500. *et vide ante*, p. 331. *et seq.*

(*y*) 17 Ves. 466, and see *ante*, p. 285.

(*z*) 4 Ves. 811. *et vide Baker* v. *Hull*, 12 Ves. 497. also, Ambl. 495. 1 Bro. C. C. 61.

(*a*) 17 Ves. 466. and *supra*, p. 285. See also Chap. XII. on the exoneration of the real by the personal estate, and the next chap. sect. 1. *et passim.*

ing whether the testator intended to change the nature of his freehold property, and to impress upon it the character and quality of personal estate to all intents and purposes. By this test alone were all the cases determined which relate to the present subject.

If then a sale or charge of freehold property be directed to answer *particular* purposes, and any of them fail by lapse in the testator's life, we have seen that the heir will be entitled to the benefit of them, because those interests are to be considered as so much land undisposed of.

But where the testator ordered his freehold estate to be sold, and the proceeds to be added to his personal property, and directed both to be applied indiscriminately in the payment of debts and legacies, and then gave the surplus, as before mentioned, to *A.* singly, or to *B.* and *C.* as tenants in common; such a disposition has been considered, with other circumstances, a total conversion of the land into money, so as to entitle *A.* or *B.* and *C.* to the benefit of lapses in preference to the heir.(*b*)

The doctrine of conversion of real into personal estate being of frequent occurrence, and great nicety, it is presumed that no apology will be necessary for devoting the ensuing chapter to the exclusive consideration of so important a subject.

CHAPTER IX.

Of the Conversion of Real into Personal Estate.

THE person appointed by law to succeed to the undisposed freehold estate of his ancestor is the heir, so that his title being to the whole, includes every part. Hence, if the estate, or any portion of it, be not devised, or not effectually disposed of, it descends to, or is a resulting trust to the heir: Questions, therefore, as to the heir's title, may be reduced to three. *First*, whether he is *wholly* disinherited by the devise of the estate to a stranger, subject to particular charges. *Secondly*, whether he is *partly* so disinherited, the estate being devised merely to answer particular purposes. Or, *thirdly*, whether the disposition of the property be such, as clearly to show the testator's intention to change the nature of the fund, by converting it from real into personal estate, which is commonly described as "*a conversion out and out.*" In the first case, if the heir be so wholly disinherited, the devisee will be entitled to the benefit of the failure of any charges imposed upon it by the testator; since he is substituted for the heir. In the second, if the estate is so devised, so much of the estate, or of its produce, as remains, after the particular purposes are answered, will result to the heir, who will also be entitled to the advantages arising from the lapse, failure, or illegality of any of the purposes to which the estate was intended to be applied. And in the third case, if such intention on the part of the testator be evident, what remains, will be money in the hands of the persons to whom the surplus is given, unless they elect to take it as

(*b*) 4 Ves. 802. 810. And see the next chapter for details upon this subject; also Chap. XII.

land: and if any of the preceding purposes fail, it seems that, in consequence of the absolute conversion of the land into personalty, the residuary legatees will be entitled to the benefits. These subjects, and others connected with them, will be separately treated of in this chapter, and discussed under the following heads:

SECT. I. Right of the heir or devisee to the surplus of real estate subjected to, charged or devised for particular purposes, as well where a sale *is*, as where it *is not* expressly directed, and their respective rights to lapsed interests.

1.—*When the* devisee *is entitled to the surplus.*
2.—*When the* heir *is entitled to it. And*
3.—*Of their respective titles to* lapsed *interests.*

SECT. II. Right of the residuary devisees or legatees, to the net produce from a sale of lands under the residuary clause.

1.—*When the net proceeds will* not *pass, but result to the heir. And*
FIRST. *When the residuary bequest is in the same will that devises the real estate.*
SECOND. *When it is contained in a codicil.*
2.—*When the net proceeds* will *pass as personal estate under the residuary clause.*

SECT. III. Right of the testator's *executors* and *next of kin*, to the net produce from the sale of lands.

1.—*Of his executors.*
2.—*Of his next of kin.*

SECT. IV. Right of the heir or of the devisees of Proceeds from a sale of land to *lapsed* interests.

1.—*Where the proceeds are given distinct from the personal estate.*
2.—*Where the proceeds are given and blended with the personal estate.*
3.—*Title of* surviving *devisees to real proceeds lapsed by the death of one or more of their companions. And*
FIRST. *When the y originally take as joint tenants.*
SECOND. *When as tenants in common.*

SECT. V. Right of *personal representatives* of devisee or legatee of real proceeds, in preference to testator's heir.

SECT. VI. When Produce from sale of land, resulting to testator's *heir*, is to be considered *land* or *money*.

1.—*When there is no disposition of the surplus.*
2.—*When the residuary real proceeds are disposed of, and part of them lapse and result to the heir.*
3.—*Election.*

SECT. VII. When the *devisees* of the real produce, take it as land or money.

SECT. I. Right of the heir or devisee to the surplus of real estate subject to, charged or devised for particular purposes, as well where a sale *is*, as where it *is not* expressly directed, and there respective rights to lapsed interests.

1. Of the devise of freehold lands for particular purposes, which entitle the *devisee* of the estate, and not the heir, to the property, after those purposes have been satisfied.

The reader will observe, that this first section embraces several cases which are not strictly cases of conversion, as the question of conversion only arises where a *sale* is directed; but it was thought advisable to discuss those cases, where no sale is directed, inasmuch as they are nearly allied to those which properly fall under consideration in the present chapter.

When it appears, upon a fair construction of the will, that the persons to whom freehold lands are given, subject to particular charges or payments, were intended to take the estate beneficially after satisfaction of those obligations, it is settled that the heir can claim nothing as a resulting trust; for he is disinherited by the disposition, and the devisee is substituted for him, and entitled to the same privileges as the heir would have been, if the estate had not been bequeathed. Hence the property, subject to the charges upon it, or to such of them as take effect, will belong to the devisee,(*a*) as remarked in the concluding section of the last chapter.

But it must be noticed, that no general rule can be laid down, as every case depends upon its own circumstances.(*b*) The only fact to be ascertained is, whether it clearly appears, from a rational construction of the will, to have been the testator's intention to give the estate to the devisee, subject only to the demands he has charged upon it.

In forming a judgment in such a case, courts of equity have considered it a material feature, when the estate was given *directly* to the devisee *charged* with the payment of sums of money, or when it was given to him *in trust*, to make such payments; and upon the following reasoning: that in the one instance, a trust being expressly created, fixes the character of a trustee upon the devisee, which renders him accountable to the heir for so much of the inheritance as is not wanted for the purposes of the will; but in the other, since a trust (if any) must be raised *by implication*, from a fair construction of the will, the intention of the testator is the chief guide; an intention which must be clear, in order to counteract the effect of a disposition, that *primâ facie* imparts to the devisee the beneficial interest in the estate. After these preliminary observations, we shall commence our inquiries in considering—

First. The effect of a devise of freehold property to a person to *sell* to a particular individual, and where no express disposition is made of the proceeds.

In *Hill* v. the *Bishop of London*,(*c*) Lord *Hardwicke* observed, in reference to this subject, that "if *J. S.* devised lands to *A.* to sell to *B.* for the particular advantage of *B.*, that advantage was the only purpose to be served, according to the testator's intention, and to be

(*a*) 4 Ves. 811. 12 Ves. 497. (*b*) 1 Atk. 620. (*c*) 1 Atk. 619.

satisfied by the mere act of selling, let the money go where it will; yet (said his Lordship) there was no precedent of a resulting trust to the heir in such a case." It is not indeed probable, that there should be a precedent to that effect; since the devise upon the face of it imports to be a devise of the estate to *A.* beneficially, with a direction (not an expressed trust) to sell it to *B.* The money, therefore, of right, would belong to *A.* to whom the estate was given.

Upon the same principle, if *A.* devise lands to *B.* to sell for the best price to *C.* or to demise them to him for three years at a particular fine, there would be no resulting trust to the heir, either of the money produced from the sale, or of the reversion upon the demise,(*d*) because the objects of the testator's benevolence were *A.* and *C.*; the former by a gift of the estate, and the latter in the privilege of purchasing or accepting a demise of it.

The same reasoning applies—

Secondly, to the devise of freehold lands to a person *charged* with (not upon express trust to pay) debts and legacies, for in such case the devisee (and not the heir) will be entitled to the surplus of the real fund after payment of the debts and legacies(*e*) and to all advantages from failures of any of the charges.

That this is well settled was stated by Lord *Eldon* in *King* v. *Denison*,(*f*) in which he observed, that if *A.* devise to *B.* and his heirs all his real estate *charged* with debts, although the disposition be for a particular purpose, it is not the only one; for the devise is of an estate of inheritance, in order to give to the devisee the beneficial interest *subject* to a particular purpose, and that where the legal interest is given for a particular purpose, with an intention to impart to the devisee of the legal estate the beneficial interest, if the whole of the real fund be not exhausted in answering the particular purpose, the surplus goes to the devisee, as it is intended to be given to him.

That reasoning Lord *Eldon* found to have been adopted and acted upon by Lord *Hardwicke* in *Hill* v. The *Bishop of London*,(*g*) a case of which Lord *Eldon* expressed his approbation. In it one *Richard Smith*, after charging all his worldly estate with his debts, bequeathed his perpetual advowson of *Bushey*, and the glebe, profits, and appurtenances, to his mother-in-law, *Grace Smith*, expressing it to be his *will and desire* that she should *sell* them to the fellows of *Eton* College, or to the fellows of *Trinity* College in *Oxford*; those of *Eton* to have the preference; but, if both refused, he directed the advowson, &c. to be sold to the fellows of any of the colleges of *Oxford* or *Cambridge*, who would give the most money for them. The testator also gave to Mrs. *Smith* absolutely his other real estates, and made her his residuary legatee and executrix. The question was, whether the testator's co-heiresses or Mrs. *Smith* the devisee, should present to the living, become vacant by the death of the testator; the former insisting upon a resulting trust, and the latter claiming the advowson, &c. as absolute devisee. Lord *Hardwicke*, after the first argument, declared in favour of the co-heiresses, under a conception that the devise was a trust in Mrs. *Smith* to sell the

(*d*) 1 Atk. 61 and see 2 Scho. & Lefroy, 545. (*e*) See Chap. XII. sect. 1.
(*f*) 1 Ves. & Bea. 272. *Baker* v. *Hall*, 12 Ves. 497. *S. P.* (*g*) 1 Atk. 618.

advowson according to the directions of the will; and also for payment of the testator's debts; after which, the surplus was a resulting trust for the co-heiresses, to whom belonged the right of presentation as *cestui que trusts*. But upon a second argument, his Lordship changed his opinion in favour of Mrs. *Smith* the devisee, for the reasons before stated.

The last case seems to be an instance of a very clear manifestation of the testator's intention to give to Mrs. *Smith*, for her own benefit, the advowson and its produce; for, independently of the circumstance that no express trust is declared, she appears upon the face of the will to be the special object of the testator's bounty, by the devise to her of an estate absolutely, and by his appointment of her as residuary legatee and sole executrix.

In the case of *Rogers* v. *Rogers*,(*h*) where a testator gave 5*l.* to his heir, and appointed his *dearly beloved* wife *sole heiress* and *executrix* of all his real personal estates, to sell and dispose of at her pleasure, and to pay his debts and legacies; the question was, whether the wife was a trustee for the heir of the surplus real property after payment of the debts and legacies? And Lord *King*, Ch. determined in the negative, because the legal effect of the devise was to substitute the wife in the place of the heir, which corresponded with the intention of the testator appearing as well from the terms of affection in which the wife was described, as in the gift of a legacy to the heir.

So also in *Lloyd* v. *Wentworth*,(*i*) the devise was "all the residue (of real estate) I give to my wife, *to enable* her to pay my debts, legacies, and funeral expenses." The testator's heir contended, that as the devise was to *enable* the wife to pay debts, &c. it was merely a gift in trust; so that, after those payments, the residue was a resulting trust for him. But Lord *Thurlow* determined in favour of the wife.

The reason of his Lordship's decree is clear, viz. the apparent intention of the testator to give his wife the estate beneficially; with a *charge* upon it for payment of his debts, &c. The case, therefore falls within the rule laid down by Lord *Eldon*, and before stated,(*k*)

The principle which produced uniformity in the last determination cannot escape observation. We shall merely add one more case of a very recent date.

In *King* v. *Denison*,(*l*) *Frances Isaacson*, after directing payment of all her just debts, devised her real estate to her cousins, *Mary Altham* and *Arabella Isaacson*, "*subject* to and chargeable with several annuities." The testatrix then gave her personal estate to three persons, "subject to and chargeable with" her debts and the legacies *after* bequeathed by her, and appointed them executors. The annuitants being dead, the real estate was claimed by the testatrix's heirs, upon the ground of its being devised for particular purposes, which having determined, they were entitled to the lands as a resulting trust; but the devisees claimed the property as a beneficial devise subject to payment of the annuities. And Lord

(*h*) 3 P. Will. 193. and see *Starkey* v. *Brooks*, 1 P. Will. 390. stated *infra*, p. 349. (*i*) Cited 2 Bro. C. C. 594. (*k*) *Ante*, p. 344.
(*l*) 1 Ves. & Bea. 260. 272. 276. 279.

Eldon's opinion was in their favour; his Lordship observing, "that the disposition was a devise in law for the purpose of giving the estate, but with an ulterior purpose that the devisees should take it subject to the annuities."

Lord *Eldon* also expressed an opinion in the above case, that if the executors were to be considered trustees of the personal residue from the effect of the words "subject and chargeable with," as applied to that fund, the same words would not produce a similar result upon the real estate given to the devisees, although those words were used in relation to both funds in the same will. "Does it follow (said his Lordship) that the words 'subject and chargeable' are to have the same construction in both parts of the will? That is not a consequence. I cannot infer from the construction which the testatrix giving these legacies has put upon those words, so much as to deny them, as to the real estate, their ordinary construction (a mere charge,) if there be no expressions, applicable to the devise of it, equivalent in their effect to pare down the ordinary meaning of those words; and the construction must be the same, as if she had expressly said, that the personal estate was to be subject to and chargeable with the legacies, that she did not mean her executors to take; but that as to the personal fund they were to be trustees, making *no* such declaration as to the real estate."(*m*)

The before mentioned authorities have proved a part of the observation made in the beginning of this section, that a devise to *A.* subject to particular charges, is a beneficial disposition to him, and repels the usual trust by implication of the estate for the heir, after those charges have been satisfied; but the remaining part of the observation alluded to remains for consideration; viz. that a devise to *A.* upon *trust* to pay particular sums of money is not, in general, a beneficial disposition of the estate in favour of *A.* but to him only and solely to execute those purposes or trusts, leaving the surplus of the property a resulting trust for the testator's heir at law. Before we proceed to produce authorities upon this subject, it is proper to remark, that the fact of the word "trust" being or not being used in the devise of the estate to *A.* is a mere *circumstance* in the case to be attended to; for if the *whole frame* of the will create a trust, for the particular purpose of satisfying which the estate is devised, the law is the same, although the word "trust" be not used.(*n*)

Thus in *Buggins* v. *Yates*,(*o*) *A.* devised his freehold estates to his wife *B.* in fee, to be sold to pay his debts and legacies in *aid of his personal estate.* There being no necessity to resort to the land for those purposes, the heir claimed them as a resulting trust, in opposition to the devisee. The Court was of opinion, that were lands are devised to be sold, in aid of the personalty, for payment of debts and legacies, and no sale is made in consequence of the sufficiency of the personal estate, a *trust* in the devisee for the heir was *clearly implied.*

But the intention to raise a trust must be clear, or the legal title

(*m*) 1 Ves. & Bea. 278. and see *Randall* v. *Bookey*, Pre. Ch. 162. and *Gibbs* v. *Rumsbey*, 2 Ves. & Bea. 294. (*n*) 1 Ves. & Bea. 273.

(*o*) 9 Mod. 122. And see *Chitty* v. *Parker*, 2 Ves. jun. 271. stated *infra*, sect. 3. sub-sect. 2.

of the devisee to the absolute inheritance of the estate will prevail; as appears from the case of *King* v. *Denison* before stated. Yet although the word "trust" be inserted in the will in the declaration of a particular purpose, to which a sufficient part of the estate is to be applied; if the contents of the will manifestly show an intention that the devisee was meant to take the estate subject to that purpose, he will be entitled to it in preference to the heir.

An instance of this was considered to occur in the case of *Coningham* v. *Mellish*,(*p*) in which *A.* devised to his cousin *Thomas Mellish* a dwelling-house to hold to him and his heirs, in *trust* to be sold for the payment of debts and legacies within a year after the testators death; and he appointed *Mellish* executor. Another cousin of the testator was his heir, who claimed the residue of the messuage after the debts and legacies were satisfied. But the Court, consisting of the Lord's Commissioners *Robinson* and *Hutchins*, decided that there was no resulting trust for the heir.

The following must have been the grounds of the decree, though their sufficiency may be doubted.(*q*) First, equality of relation between the testator and his heir and devisee; and, secondly, the preference shown to the latter in his appointment of sole executor, which gave him the whole of the personal residue in exclusion of the former. From these *data* the Court drew this conclusion: that *Thomas*, the devisee of the real estate, was the chief object of the testator's bounty; and that the testator could not intend any part of that estate to result to his heir, since it might be attended with a consequence, which would defeat his intention in giving *Thomas* his personal estate; for as that fund was first applicable to pay debts and legacies, if it were exhausted in so doing, *Thomas* would take nothing either of the personal or real property, but the heir would take all.

We shall now produce an instance of devises of real estates upon *express trusts* being held to take no beneficial interest in the property, but to be trustees of the undisposed surplus for the testator's heir.

In the case of *Southouse* v. *Bate*,(*r*) Mr. *Southouse*, after bequeathing legacies (two of which of equal amount he gave to his executors and trustees, *A.* and *B.*, devised to *A.* and *B.* "all his property, both real and personal, upon *special trust* that they pay regular the following annuities." He then gave annuities, and disposed of his clothes and furniture, appointing *A.* and *B.* "their heirs, executors, and administrators his executors, upon *especial trust* and confidence that they devoted all his property, both real and personal, in payment of his debts, and all the legacies and annuities given by him *in trust* to them. *A.* and *B.* claimed the residuary real and personal estates as beneficial devisees, and not in trust; contending upon the first part of the will, that as the trust declared was not at all applicable to real property, but only to a particular portion of the personal estate, the devise ought to be read thus: "I give and bequeath to *A.* and *B.* all my property, both real and personal; but as to my funded property on this especial trust, &c.;" a construction, if admissible, that would entitle *A.* and *B.* to the surplus of both funds

(*p*) Pre. Ch. 31. 2 Vern. 247. *S. C.*
(*q*) 1 Ball. & Beat. 544.
(*r*) 2 Ves. & Bea. 396.

as devisees for their own benefit. But Sir *William Grant*, M. R., observed, that whatever was the ambiguity of the clause, it was removed by the concluding one, which declared that the whole was given *in trust* for the payment of debts, legacies and annuities; so that it was impossible for the devisees to take any part beneficially: upon which his Honour decreed *A.* and *B.* to be trustees both of the real and personal estates; of the first for the heir, and of the second for the next of kin.

Having stated the importance to be attached to the distinction between a *trust* being or not being *expressed* in devising an estate for a particular purpose, we shall proceed to consider—

2. The cases establishing the title of the *heir* to the residue of real estates devised *upon express trust* for particular purposes, after those purposes have been answered, where the surplus is *not* disposed of, and the real and personal funds are kept distinct.

In *Randall* v. *Bookey*,(*s*) lands were devised to trustees in *trust* to permit the testator's wife to receive the profits for life, and afterwards to sell them, and to pay out of the proceeds 150*l.* to *J. S.*, and 100*l.* to one *Randall* (the testator's heir;) and the wife was appointed executrix, with a legacy. The heir claimed the surplus produce from the sale of the lands, and it was so decreed; the Court remarking, that the devise was in the nature of a mortgage, and that the heir paying the legacies must have the land, although he had a particular legacy out of it.

In the last case, it is obvious that no person could take the lands subject to the legacies, except the heir. The devisees were precluded, as the estate was expressly given to them *upon trust* to answer particular purposes. The executrix could not take the net proceeds, as they formed no part of the personal residue, from which even she was excluded by the gift of a legacy; and as to the testator's next of kin, there was no pretence for their claim, since the conversion of the real fund was only partial, merely for the purpose of paying the two legacies.

The next case which presents itself is *Hobart* v. The Countess of *Suffolk*,(*t*) in which Serjeant *Maynard* devised to three persons all his real estates upon the trusts after mentioned. *viz.* after the death of his wife to convey part of them to Sir *H. Hobart* and *Elizabeth* his wife for their lives and the life of the survivor, the remainder to her first son, (afterwards to Sir *John Hobart*) for ninety-nine years, *if he* so long lived, remainder to his issue male; and also to convey other part of his estates to his grand-daughter *Mary Maynard*, (afterwards Countess of *Stamford*) for life; remainder to her issue male, with a cross-remainder on the failure of issue male of either; and he made no disposition of the reversion in fee of either part of his estates, which was claimed by the persons to whom the lands were devised in trust; but the testator's heir insisted, that he was entitled to it as a resulting trust, and so the Court decided.

The principle of the last case seems to be the same which governed those which preceded, *viz.* that the devisees could not claim the estates beneficially contrary to the express terms of the devise, under which they derived their title, the disposition to them being ex-

(*s*) Pre. Ch. 102. (*t*) 2 Vern. 644. Ed. by. Raithby.

pressly upon trust.(*u*) The Court therefore declared, that the testator did *not intend* the devisees of the legal inheritance to take the lands in preference to his heirs, if Sir *John Hobart* and Lady *Stamford*, both died without issue male.

In *Wych* v. Sir *John Packington*,(*x*) a case determined on appeal to the House of *Lords*, Sir *Herbert Perrot* bequeathed to his dear wife and *executrix*, a rent-charge of 200*l.* a year, to be received by her, her executors, administrators, and assigns, out of part of his real estates; but upon special *trust* and *confidence* that she, his *executrix*, her executors, &c. might be supplied with money out of the rents and profits for payment of all his debts and legacies: for which purposes he gave to his said *executrix*, her executors, &c. a lease for *thirteen* years of the said rent-charge, to begin within six months after his death. The testator then gave to his wife and executrix *for her own benefit* all his lands in the county of *Hereford*, for life, in augmentation of her jointure. The question was, whether the rent-charge was a beneficial devise to the wife or solely given to her for payment of debts and legacies in aid of the personal fund? And the Lords confirmed the first decree,(*y*) pronounced in the cause, which declared, that the rent-charge was not a beneficial devise to the wife, but that there was a resulting or implied trust for the heir after the discharge of such of the debts and legacies as the personal estate should be deficient in satisfying.

The grounds of the last decision appear to be these: 1st, that the devise was not made to the wife in her private character, but *as executrix;* whence an inference arose that the only motive for the grant was to answer the purposes of the will: 2dly, that such inference was reduced to certainty by the declaration of the testator, that the devise of the rent-charge was made upon *special trust* to pay debts and legacies. And 3dly, from the consideration, that what the testator intended for his wife beneficially, he so declared; as in the instance of the devise in augmentation of her jointure; to which may be added the circumstance of the testator postponing the commencement of the rent-charge until *six months after* his death, which he could not reasonable be supposed to have done in consistency with an intention, that it was to be for his wife's use; but such postponement is quite consistent with the construction of the grant being purely made in aid of the personal estate for the payment of debts and legacies.

The following is not merely an authority, that a devise upon *trust* of lands to pay debts and legacies does not preclude the heir from so much of the estate, as remains after those purposes are satisfied; but also, that if one of the legacies be given to him, such circumstance alone will not alter his right; upon the principle, that no disposition having been made of the residuary real estate, the heir takes it by gift of law, and not in consequence of the testator's intention.

Thus in *Starkey* v. *Brooks*,(*z*) *Philip Starkey* devised his lands to

(*u*) 1 Atk. 620.

(*x*) 3 Bro. Parl. Ca. 44. 8vo. ed. and see *Halliday* v. *Hudson*, 3 Ves. jun. 210. stated *infra*, p. 353.

(*y*) 3 Bro. Parl. Ca. p. 47.

(*z*) 1 P. Will. 390. *Randall* v. *Bookey*, stated *supra*, p. 348. *S. P.*

two persons, *in trust*, that they or the survivor should sell them for the best price, and pay with the produce his debts, legacies, and funerals. Two of the legatees were his cousins and co-heirs. The lands exceeded by 500*l.* the debts, &c. and the question was, whether that sum belonged to the devisees in trust, or to the co-heirs? And Lord *Cowper* decided in favour of the heirs, notwithstanding it was objected that the legacies given to them implied that they were meant to have nothing more.

The case of *Stonehouse* v. Sir *John Evelyn*,(*a*) which will be next stated is one of a particular kind. The question in it was between the testator's heir and particular legatees; and is an authority for the proposition, that where real estate is given in trust to pay particular legacies, with a gift of other legacies should the proceeds from the sale of the land exceed the amount of the former, suppose by 500*l.* if these proceeds exceed the first class of legacies, but do not amount to 500*l.* the excess will belong to the heir as a resulting trust, and not be applicable to a proportional discharge of the second class of legacies. The principle is this, that the gift of the latter legacies being made to depend upon the event of the real estate producing an excess of 500*l.*; as that event did not happen, the real excess was undisposed of, and necessarily resulted to the heir; the devisee in trust having no right to it, as appears from the preceding cases.

In *Stonehouse* v. Sir *John Evelyn*, (the case last mentioned,) Lady *Wych* being seised in fee of a rent-charge of 38*l.* 16*s.* devised it to *Thomas Dalton in trust*, to pay several annuities (which had determined,) and then three legacies to *A.*, *B.* and *C.*, amounting to 800*l.* But *if* the rent-charge sold for 1000*l.* the testatrix gave additional legacies of 100*l.* each to *B.* and *C.* The suit was instituted by *A.* for a sale of the rent-charge, and payment of his legacy. And the question was, to whom the surplus would belong, if it exceeded 800*l.* but was less than 1000*l.*? It was claimed by *B.* and *C.* in part payment of their further legacies. But Sir *Joseph Jekyll*, M. R. said, that as nothing was declared in the will to that effect, to admit such a claim would be to make a new will; wherefore, as to all the money arising from the estate to be sold, and not disposed of by the testatrix, there must be a resulting trust for the heir; so that if the rent-charge be sold for more than 800*l.* but under 1000*l.* the difference must be paid to the heir at law.

The next case we shall mention is *Sherrard* v. Lord *Harborough*,(*b*) in which *Bennet*, Earl of *Harborough*, devised his manors, advowsons, &c. to persons *in trust* to pay out of the rents and profits an annuity of 1000*l.* to the then Earl, the testator's eldest son and heir, for life, and to invest the surplus rents to accrue, *whilst his son lived*, in the purchase of lands to be settled, *after his son's death*, upon his (the son's) first and other sons successively in tail, with remainder over. One of the questions was, in whom the right of presentation to the advowsons belonged during the life of the testator's heir the then Earl. And the Court declared the right to be in the Earl as heir of the testator.

The reasons for that opinion seem to be these; the devisees of

(*a*) 3 P. Will. 252. See Chap. XX. s. 13. (*b*) Ambl. 165.

the legal estate had no claim, as the property was given to them *upon trust*. The heir was in the same condition as to his title *under the will*, since nothing was given to him but a rent-charge for life; and the persons in remainder were excluded, as nothing was limited to them until after the death of the heir. Hence it followed that the right of presentation during the heir's life was a fruit of the estate undisposed of, which necessarily resulted to him.

The reader is here referred to the cases of *Robinson* v. *Taylor*, *Chitty* v. *Parker*, *Hill* v. *Cock*, and *Dixon* v. *Dawson*, stated in section 3 of this chapter,(*c*) and which are instances of the heir's being entitled to the surplus produce of the sale of lands.

3. After discussing the title of the heir and devisee to the undisposed surplus of real estate, remaining after the purposes to which it was liable were satisfied, what remains for consideration is, their rights to such of the interests affecting the lands as lapse or fail by the deaths of parties or otherwise.

FIRST, with respect to the title of the *devisee*.

It is a consequence from what has been detailed in regard to the rights of the heir and devisee to the undisposed surplus of real estate, that when the devisee takes the estate as a beneficial gift, he will be entitled to all such charges affecting it as a lapse,(*d*) or fail.

Thus in *Jackson* v. *Hurlock*,(*e*) Sir *John Hartopp* devised in fee to *Sarah Marsh* his manors of *B.* and *C.*, subject to and *charged* with the payment of any sum of money not exceeding 10,000*l.* in favour of such persons as he, by a written memorandum, should direct. He afterwards appointed 6000*l.* part of the sum, to charities. Such appointment being void, the question was, whether the heir or devisee should have the benefit of the failure? And Lord *Northington* decided in favour of the latter.

Yet a case may occur, in which the estate of the devisee may be charged with a sum of money that cannot be applied according to the intention of the testator, as when the object is a charity; and notwithstanding the failure, still the devisee will be under the necessity of paying the money to which the heir will be entitled as so much real estate undisposed of. Suppose, then, a devise of land to be made to *A.* he paying 1000*l.* to the testator's executors, which sum, forming part of the testator's residuary estate, is bequeathed to charities; the bequest of the money for such a purpose would be void; yet the devisee of the land would be obliged to pay it, because the condition requiring him to make the payment to the executors, and not to the charities, is good, and must be performed. The payment of the sum is the price and consideration of the devise, and as the money is so much real estate undisposed of, there is no person but the heir can make a good title to it.(*f*)

SECOND, With respect to the title of the *heir*.

It only remains to be observed upon this subject, that as the heir is entitled to every interest in freehold estate which is originally undisposed of, or becomes so by accident, if the devise be made in

(*c*) P. 360, &c. *infra*.
(*d*) 4 Ves. 811.
(*e*) Ambl. 487. 495. 2 Eden. 263. *S. C.* See also *Wright* v. *Row*, 1 Bro. C. C. 61. and 4 Ves. 810.
(*f*) *Arnold* v. *Chapman*, 1 Ves. sen 108.

trust to pay legacies, so that the devisee is merely a trustee, and not entitled to the estate beneficially, and some of the legacies are void as to the land, in being given to charity, or lapse by the deaths of legatees during the life of the testator, or before the legacies become due, they will sink into the estate for the benefit of the heir, the person entitled to the estate, subject to the charges;(*g*) but with this qualification, that if the devise be in trust to pay legacies generally, then (as has been noticed) the lapse or other failure of any of them, will not accrue to the heir, if the whole fund be necessary to discharge the remaining legacies; but that if the devise be in trust to pay particular sums of money to individuals, then the heir will be entitled to such of them as fail by lapse or otherwise.(*h*)

The conversion of the real estate, so far as previously considered, has been merely to the extent of answering particular purposes expressed by the testator, and where *no disposition* was made of the surplus of the lands. We shall now proceed to inquire—

Sect. II. What will and will not amount to a disposition of the produce from a sale of the real estate, under the terms of the residuary clause, upon which the right of the heir or residuary legatee to them depends.

In discussing this subject, it will be convenient first to consider—

1. When the produce from the sale of lands will not pass under a residuary bequest of the personal estate, whether the disposition be made by will or codicil. And—

First, When the residuary personal bequest is contained in the will devising the real estate.

Where a testator gives his real and personal property in trust to be sold for particular purposes, and does not specifically dispose of the surplus proceeds, but makes a general residuary bequest of his *personal* estate, such a disposition will not include the produce from the sale of the land, in the absence of a contrary intention expressed or inferred from the will, and for this reason; the surplus of the real estate is not made personal; it, therefore, does not fall within the terms of the bequest. The conversion of the lands into personalty *is* merely to answer particular purposes, which, when performed, the residue, continuing land and being undisposed of, necessarily results to the heir. So that if *A.* devise his freehold and personal, or his freehold estate to *B.* in trust to sell and apply the proceeds in payment of legacies, making no further disposition of the real produce, and then bequeath the residue of his estate,(*i*) or of his personal estate to *C.*, the net surplus of his real estate will not pass to *C.* for the reasons before mentioned, but it will be a resulting trust for the heir of the testator. To prove this the following authorities are produced:

In *Berry* v. *Usher*,(*k*) *James Plomer* devised all his real and personal estate to *John Usher*, in trust to pay the rents of the one and

(*g*) 3 Bro. C. C. 355. (*h*) 17 Ves. 466. and *supra*, p. 285.
(*i*) *Digby* v. *Legard*, 3 P. Will. 22. *in notis*. Ed. by Cox, and 1 Bro. C. C. 514.
(*k*) 11 Ves. 87.

the interest of the other, to *Susannah Berry* for life, and then to sell both funds; out of the produce of which he gave several legacies, and appointed *Usher* and *Berry* joint *residuary* executrix and executor. The question was, whether so much of the proceeds of the real estate, as remained after the purposes of the will were satisfied, belonged to the heir or residuary legatees? And Sir *William Grant*, M. R. determined in favour of the heir.

The foundation of the decree was, that the conversion of the real into personal estate was merely co-extensive with the purposes expressed in the will, viz. to pay the legacies; so that the surplus, continuing land, could not pass as personal estate under the appointment of *residuary* executors.

The last case was shortly followed by a similar decision of the same Judge in *Wilson* v. *Major;*(*l*) a case, however, in which the terms of the residuary clause might have included the net proceeds of the real estate, had not a contrary intention in the testator appeared. There, *Thomas Major* devised a copyhold estate to his wife *Dorothy*, in trust to sell and invest the proceeds upon real or government securities; the interest of which he gave to her for life. He further bequeathed to her *all* his *effects* for her support, &c. The copyhold estate was not sold; and the wife being dead, the question was, whether it belonged to the testator's heir, or to the persons claiming under the wife? which depended upon this, whether the capital to be produced from the sale of the estate passed to her under the residuary clause? And Sir *William Grant* determined, that the heir was entitled to it, upon the principle that the testator could not intend to give to his wife, by a residuary bequest in form properly importing a disposition of personal estate only, an absolute interest in a fund produced from the sale of real property, when he had previously bequeathed to her the annual income of it merely for life. The copyhold estate, therefore, being undisposed of, necessarily resulted to the customary heir.

Similar to the last was the case of *Halliday* v. *Hudson*,(*m*) where *Robert Halliday*, after appointing his nephew *Hudson* sole executor of his will in trust to execute it in the following manner, devised to him all his freehold and leasehold estates, except a house which was subject to a life-interest, and the reversion of which he gave to his nephew and heir, *R. Halliday*, for life, remainder over. He then gave *Hudson* his personal estate, "to enable him to discharge all his debts and legacies;" and bequeathed two legacies to his female servant, which he considered as a debt, and declared that his situation was such as obliged him to make a will, otherwise his heir would take all his lands, and his debts remain unpaid, of which he specified two, amounting together to 1000*l.*, and directed his executor to pay them, with a few others. The *rest* and *residue* he gave to his executor before named. The testator made a codicil, naming *Halliday* an executor with *Hudson;* gave him 100 guineas, and appointed him joint residuary legatee with *Hudson*. There were only two witnesses to the codicil, so that it could not affect the freehold estate. *Halliday*, the heir,

(*l*) 11 Ves. 205. and see 8 Ves. 485-495.

(*m*) 3 Ves. jun. 210. and see *Wych* v. *Packington*, *supra*, p. 349. also, *Kellett* v. *Kellett*, 1 Ball. & Beat. 533. *S. P.*

claimed the land subject to the debts, which was resisted by *Hudson*, on the ground that it passed to him by the residuary clause. But Lord *Rosslyn* decided in favour of the heir; and that, under the particular circumstances, the beneficial interest in the freehold estate did not pass with the residuary personal property.

The grounds of his Lordship's opinion were these: that the words "rest and residue," were, in the abstract, of ambiguous construction; but that the sense in which they were used was explained by the context; for it appeared that the only motive of the testator in affecting his real estate was to secure the payment of his debts, and the land was devised to *Hudson* as executor, and upon express trust for that purpose; which, with the circumstance of the testator evincing no disinclination to his heir, nor intention to disinherit him, were held sufficiently demonstrative of the testator's meaning not to include the surplus of his real property in the residuary disposition, but merely to create a charge upon that fund, in favour of his creditors, in aid of his personal estate.

The same reasoning produced the decree in *Maugham* v. *Mason*,(*n*) where *Charles Prior* devised his freehold chambers in *Lincoln's Inn* to trustees, in trust to sell and apply the produce towards payment of legacies; and after making some specific bequests of stock, and giving two pecuniary legacies, he bequeathed the residue of his *personal* estate, of what nature or kind soever, after payment of his debts, legacies, and funeral expenses, to his trustees, their executors, &c. upon trust to convert it into ready money, and invest it in the purchase of real property, to be settled by them to the separate use of his niece *Cecilia Maugham* for life, remainder to her first and other sons successively in tail male, with remainders over. The personal estate was more than sufficient to pay debts, legacies, funeral, and testamentary expenses; and *Cecilia* being dead, leaving a grandson, the question was between him, claiming under the residuary clause the produce from a sale of the chambers, and the testator's heir; the former claiming them as personal property, and therefore as bequeathed, and the latter claiming them as real property, and not passing by the residuary clause; upon the principle, that the conversion was directed for the sole purposes of discharging debts and legacies in aid of the personal fund; which being sufficient to pay all those obligations, the chambers or their produce could not pass under a bequest merely disposing of personal estate; and of that opinion was Sir *William Grant*, M. R. who thus expressed himself upon the general question: "This is a general bequest of the residue of the testator's *personal* estate; and the question is, what was meant to be included under that description. Properly speaking, nothing is the personal estate of a testator that was not so at his death. He may certainly so express himself, as to show that something else was intended; but where there is nothing but a direction to sell land, with application of the money to a particular purpose, and a subsequent bequest of the rest and residue of the *personal* estate, I know of no case in which it has been held that the surplus, after the particular purpose is answered, forms part of the

(*n*) 1 Ves. & Bea. 410. and see *Hutcheson* v. *Hammond*, 3 Bro. C. C. 129-143.

personal estate, so as to pass by the residuary bequest. The mere disposition of the residue of personal estate can never solve the question, what is personal estate? The clause may be so conceived, as to show the sense in which those words are used; but here is nothing more than those words, unaccompanied with any thing explanatory of the sense in which they were used."

So in *Dunnage* v. *White*,(*o*) *David Lewis* devised and bequeathed to his trustees a freehold estate at *B.*, upon trusts therein mentioned; and after giving some legacies, he *devised* and bequeathed the residue "of his estate and effects whatsoever and wheresoever, of what nature or kind soever," to his said trustees and executors, upon trust to sell his household goods and stock in trade; to collect all the debts owing to him, and to divide them into six parts, which he gave to his nephews and nieces. The question was, whether a freehold farm at *C.* passed by the residuary clause. And Sir *Thomas Plumer*, M. R., determined, that although the real property passed to the trustees under the general words in the beginning of the clause, yet, as there was no trust declared of it, nor any intention to be collected from the will, that the testator meant to comprise and bequeath it as personal estate, and the trusts in the residuary bequest merely regarded the personal fund, it did not pass by the residuary clause; and his Honour declared in favour of the testator's heir.

SECOND, when the residuary bequest is inserted in a *codicil* to the will.

The same observations apply to a general disposition of the personal residue by a codicil duly attested, to pass lands, as to such a disposition contained in the same will, devising the real estate to be sold to answer special purposes, and not specifically disposing of the net proceeds; so that if a testator devise his real and personal estates, or his real estate, in trust to be sold to answer particular objects, and omit to make any disposition of the produce *ultra* those objects, other than in bequeathing his residuary personal estate by a codicil sufficiently attested to pass lands, that produce will not be included in such a general bequest; since what remains of the money arising from the sale, after answering the special purposes to which it was applicable, is land, and not personal estate, and therefore not within the terms of the bequest.

So also, if the codicil were not duly attested to pass freehold property, and the produce from its sale, after answering the purposes of the will, be expressly disposed of by the codicil; yet that produce cannot pass by such instrument, because the conversion of the real into personal estate being merely partial, *viz.* to answer particular purposes, the net proceeds do not loose their original quality, but continue land; they therefore can only pass by a will or codicil attested as the law requires(*p*) for the disposition of real estate.

Accordingly, in *Sheddon* v. *Goodrich*,(*q*) the testator devised all his real estates in the islands of *Bermuda* to his wife for life, with a direction to his executors to sell all his real and personal estates

(*o*) 1 Jac. & Walk. 583. (*p*) 29 Car. II. chap. 3.
(*q*) 8 Ves. 481, 495. and see *Hooper* v. *Goodwin*, 18 Ves. 156-166. *S. P.* 1 Jacob. R. 375.

after his wife's death, and pay to his three daughters 6000*l.* sterling. The testator appointed his son residuary legatee, bequeathing to him the residue of his estate which should remain in the hands of his executors; and without making any disposition of the produce from the sale of his real property, after payment of the above legacies. The testator made another will, not properly executed, to pass freehold lands, by which he gave the residue of his estates, wherever situate, for the benefit of his children. He also by a codicil, not duly attested, to pass lands, devised the residue of his estates for the use of his children, who under the two last instruments claimed the produce from the sale of the lands, after satisfaction of the legacies, in opposition to the heir at law. But Lord *Eldon*, C., determined the question in favour of the heir, upon the principle, that the real estate being merely converted into personal for the purpose of paying the legacies, what remained of the produce from the sale, after their satisfaction, was land, and could not pass by the second will or codicil, in consequence of neither of them having been properly attested to dispose of real property.

It appears from what has been said, that the reason, why the produce from the sale of lands will not pass by a residuary clause disposing of personal estate, is, that the real was not converted into that species of property, and therefore did not fall within the terms of the bequest. But since a testator may decide what shall be the nature of his property after his death, and consequently pass his real estate as personal in a residuary bequest of the latter fund, we shall proceed to consider,—

2. Under what circumstances the proceeds from the sale of lands have been held to pass with, and as part of personal estate, in a residuary bequest of personalty.

The blending and disposing of the real proceeds with the personal estate have been constantly considered to afford an argument for the complete conversion of the real estate into personal; but that circumstance is not conclusive. The charge may be *sub modo* only, *viz.* to answer special purposes; in which case, as before appears, the surplus produce of the lands will continue real estate. If, however, no particular motive be apparent, to which can be ascribed an intention to change the nature of the real fund, and the testator has declared or shown an intent that he meant to dispose of his real as personal estate, then the land will pass under a residuary personal clause as personal estate.(*r*)

Such an instance occurred in the case of *Mallabar* v. *Mallabar*.(*s*) The testator devised and bequeathed all his real estates to his sister, upon trust to sell and pay his debts; and out of the remainder of the purchase money, to discharge several legacies, one of which, 500*l.*, was given to his heir. And, after and subject to debts and legacies, he gave the *residue* of his *personal* estate to his said sister, whom he appointed executrix. The question was, whether there was a resulting trust for the heir of the money arising from the sale of the real estate, after payment of the debts and legacies? And Lord *Talbot* held, that the testator had made all his property personal; or rather, he inferred from the purpose of the testator, as far

(*r*) 2 Scho. & Lefroy, 545. (*s*) Forrest, 78. 1 Bro. C. C. 509.

as it could be collected from the will, that the testator meant, by the residuary clause, to describe not only money strictly personal estate, but money arising from the sale of the real property. His Lordship made that inference from the circumstance of the heir having the legacy of 500*l.* out of that very money; and because, if a different construction were made, the testator's sister, his residuary legatee and executrix, (to whom he clearly intended to give a beneficial interest) would have taken nothing but a troublesome office; for, if the words "the residue of the personal estate," did not include this money, the personalty must have been first applied to pay debts and legacies in exoneration of the real estate; and then the executrix would have had an office of trouble without the benefit intended her; a consideration relied upon by Lord *King*, in the case of *Rogers* v. *Rogers*.(*t*) Under those circumstances, Lord *Talbot* decreed to the sister the whole residue, consisting of the net produce from the sale of the real estate, and the residuary personal property.

So in *Brown* v. *Bigg*,(*u*) the testator being possessed of money in the funds and other personal estate, and seized of freehold and copyhold estates, devised the real property to his wife for life, remainder to his godson *John Bigg* in tail, with remainders over. He also gave to his wife for life, his funded property, but if she married again, he bequeathed to her half the dividends only, and the other half to his nephews and nieces. The testator then ordered and empowered his wife to sell (if she pleased) with the consent of *William Roberts*, all his *Gransden* estates, and the crop, barns, stock, furniture, chattels, and effects, with all convenient speed; and the proceeds to be placed out *upon security*; the interest of which, as of all money due to him on other securities (except money in the funds,) he gave to his wife in like manner as before expressed. He then bequeathed several legacies, and gave (after his wife's death without issue by him) the whole of his personal estate, principal and interest of every kind, *both on public and private securities*, not before disposed of, to his nephews and nieces, naming them, in equal shares. Part of the *Gransden* estate having been sold by the widow, the produce was claimed both by the heir and the residuary legatees; the latter insisting that they formed part of the testator's personal estate, and, therefore, passed by the residuary bequest of the personalty; and of that opinion was Sir *William Grant*, Master of the Rolls.

The ground of his Honour's opinion seems to have been, that the testator considered so much of the produce of his real property, as his widow might sell, to be part of his personal estate, which clearly appeared from the direction to place the real proceeds upon security, and the *disposition* of them as, and in the same clause with, his personalty.

(*t*) 3 P. Will. 193. stated *supra*, p. 345. and see *Coningham* v. *Mellish*, Pre. Ch. 31 stated *ante*, p. 347.

(*u*) 7 Ves. 280. and see *Hutcheson* v. *Hammond*, 3 Bro. C. C. 128. 143-147. stated *infra*, sect. 4, with observations; also *Fletcher* v. *Ashburner*, 1 Bro. C. C. 495, stated sec. 5. and *Van* v. *Barnett*, 19 Ves. 102-111, *infra*, sec. 5.

Sect. III. Rights of testator's executors and next of kin to the net produce from the sale of lands.

1. It seems, that when it clearly appears to have been the testator's intention to impress upon his real estate the character of personal to all intents and purposes, the mere appointment of an executor will be sufficient to carry the former as personalty, either for his own benefit, or as a trustee for the next of kin.(*x*) The reason is, that an executor is the testator's residuary legatee appointed by law, and entitled as such to all the personal property (except perhaps lapsed interests,) which the testator has not disposed of. Hence it follows, that when the intention that the real estate should be converted into and pass as personal is apparent, the executor will take it beneficially in all cases, where he is so entitled to the personal property; and that he will be a trustee of it for the next of kin in all instances, where he is to be considered as holding the personal estate upon the like trust.(*y*)

An instance of this occurred in the case of the Countess of *Bristol* v. *Hungerford*.(*z*) *A.* devised to trustees his freehold estate, to be sold for the payment of debts, and the surplus (if any) to be considered personal estate, and to go to his executors, to whom he gave 20*l.* a piece. Sir *John Trevor*, M. R. declared that the surplus of the real and personal estates, were held by the executors in trust for the next of kin of the testator. A decree which could only be pronounced in regard to the real proceeds, upon the ground of their absolute conversion into personalty, and passing as such to the executors.

But in *Gibbs* v. *Rumsey*,(*a*) a question arose, whether the net produce of lands devised to executors and trustees in the *residuary clause*, with the personal estate, to be at their disposal generally (to whom the lands were previously devised upon trust to sell and pay legacies, together with the personal fund) were beneficially given to them as residuary legatees, or in trust only in their character of trustees and executors. And Sir *William Grant* determined in favour of their claim as residuary legatees, upon the ground of the residuary clause amounting to an express gift of the net proceeds to them beneficially; and consequently negativing any resulting trust to the heir; and repelling any right of the next of kin, founded upon the presumption of the executor's taking the real proceeds as personal estate upon trust, to distribute among them.

In that case, *Ann Clarke* devised her real and personal estate to *Henry* and *James Rumsey*, in trust to sell; and out of the produce, together with her ready money, &c. and all other her estate and effects, she gave her legacies, two of them being of 100*l.* to each trustee, for his care and trouble. She then gave the residue of the produce from the sale of her real estate, and the remainder of her personal estate, after payment of debts, legacies, funeral, and testamentary expenses, to her said trustees and executors "to be dispos-

(*x*) So laid down by Sir *William Grant*, in *Berry* v. *Usher*, 11 Ves. 91.
(*y*) See *Robinson* v. *Taylor*, 2 Bro. C. C. 588-594.
(*z*) 2 Vern. 645. and see 3 P. Will. 194. Ed. by Cox, *in notis*, where the report in Vernon is corrected, and see *Southouse* v. *Bate*, 2 Ves. & Bea 396. *S. P. supra*, p. 353.
(*a*) 2 Ves. & Bea. 294.

ed of to such person and persons, and in such manner and form, and in such sum and sums of money, as they in their discretion, should think proper and expedient; and she appointed *Henry* and *James Rumsey* executors. The debts exceeded the amount of the personal estate, and after satisfying the purposes of the will, there remained a surplus of the money from the sale of the lands; and to whom it belonged was the question? Sir *William Grant*, M. R. declared, that the executors were entitled to it beneficially in the character of residuary legatees, as before mentioned.

The grounds of his decree were these; that the first words of the residuary clause were an absolute gift, the mere circumstance of giving to the legatees the description of trustees and executors being insufficient to convert them into trustees, by *implication* of that part of the property *expressly* bequeathed to them.

2d. That the residue was not given to them upon trust; and 3dly, that the expressions "to be disposed of to such person and persons, and in such manner and form, and in such sum and sums of money, as they in their discretion should think proper and expedient," were too indeterminate in their object to raise an implied trust.

The next subject to be considered is—

2. The right of the testator's next of kin to the net proceeds from the sale of real estate.

The title of the next of kin to the clear produce from the sale of land, depends upon the testator's intention to convert that property into personalty, to all intents and purposes. He has the power to effect that change in the nature of his real estate, so as to preclude all question between his real and personal representatives after his death.(*b*) Having then such a right, the only instance, it should seem, in which the next of kin can claim the real proceeds in preference to the heir, in the absence of express declaration to that effect, is, where a testator simply directs his real estate to be converted into personal, expressing no purpose whatever, in reference to which that conversion was to be made, and abstaining from making any disposition of the produce, either expressly or impliedly; for in such a case, it seems to be a necessary inference, that the sole intent of directing a sale of the real fund, was to make it personal; and as the personal estate, if undisposed of, results to the next of kin, the produce of the real property will belong to them, as part of the personal.(*c*)

But that reasoning is inapplicable where an object for the conversion of the realty into personal property, appears upon the face of the will, as to pay debts and legacies; and the net produce from a sale of the land is undisposed of; for, in such case, there is neither intention nor disposition of the real proceeds, after the particular objects for conversation are satisfied; and a court of equity will not impute to a testator an intent to convert his real estate into personal, for any other purposes than those which are expressed. Hence it follows, that the net produce from the sale of the estate, retains its real quality, and results to the heir, whose right will not be affected,

(*b*) 1 Bro. C. C. 506. *Wainwright* v. *Benlows*, Ambl. 583.
(*c*) 1 Ves. & Bea. 175.

although the testator declare that the money shall be considered as part of his personal estate.(*d*)

Thus in *Hill* v. *Cock*,(*e*) *William Farnham* devised to trustees some of his freehold estates, together with his personal property, in trust to sell, and out of the proceeds, to discharge, in the first place, their expenses; and without making any further disposition, he appointed his trustees executors. The representative of the testator's next of kin claimed the net produce from the sale of the lands, as part of his personal estate, of which no disposition was made. But Lord *Eldon* determined that since the only purpose expressed for converting the real into personal estate, was that of re-imbursing his trustees their expenses, so much of the residue as arose from land was to be considered real estate, and belonged to the heir.

Consistently with the principle of the last, Lord *Rosslyn* decided the prior case of *Chitty* v. *Parker*,(*f*) in which Mrs. *Chitty* devised her freehold estate to be sold, and all her property to be converted into money, using the expressions "which I give and devise as follows." She then gave several legacies. But all the purposes of the will were satisfied without the necessity of resorting to the real estate, which was not sold. The next of kin claimed it as money undisposed of in opposition to the heir. The Court, however, determined in favour of the latter, upon the principle, that the conversion of the real estate into personal, was not absolute to all intents and purposes, so that the title of the heir to it was incontrovertible.

So in *Robinson* v. *Taylor*,(*g*) the testator, after giving several legacies, devised the residue of his real and personal estates to his executors thereinafter named, in trust, to sell the real estate and place the produce at interest, and to pay *thereout*, and *out of the remaining part of his personal property* a particular annuity. He then gave other annuities and legacies, directing the remainder of the money which should be then at interest to continue so, and he merely disposed of it during the life of his cousin, *Mary Stuart*, for her benefit, and made no other bequest of the real proceeds. Upon a question between the heir and next of kin, to whom the surplus of the real estate belonged, Lord *Thurlow* determined in favour of the heir, upon the principle that the conversion of the land being merely for particular purposes, the residue resulted to the heir, as real estate, of which no disposition had been made.

To the preceding cases that of *Dixon* v. *Dawson*(*h*) may be added. There the testatrix devised her real estates to trustees, upon trust to be sold, and with the produce to pay and discharge all her just debts, funeral, and testamentary expenses and legacies, except her charitable legacies, which she directed to be paid out of her personal estate legally applicable for that purpose; and the testatrix further directed separate accounts to be kept of the proceeds of her real and of her personal estate legally applicable for charitable purposes; declaring, that if the proceeds of her real estate should be insufficient to pay the legacies directed to be paid therewith, the trustees should apply her personal estate in payment of such legacies. The testa-

(*d*) *Collins* v. *Wakeman*, 2 Ves. jun. 683. 18 Ves. 166. (*e*) 1 Ves. & Bea. 173.
(*f*) 2 Ves. jun. 271. and see *Buggins* v. *Yates*, 9 Mod. 122, stated *supra*, p. 346.
(*g*) 2 Bro. C. C. 588. 1 Ves. jun. 44. *S. C.* (*h*) 2 Sim. & Stu. 327.

trix then added, that if any part of her personal estate remained, after satisfying debts and funeral expenses, and satisfying the charitable and other legacies, the trustees should pay and transfer such residue of her said estate and effects unto her relation Dr. *William Craven.* The testatrix left *Philip Dixon* her heir at law. The trustees sold all the real estates in *P. Dixon's* lifetime, but the testatrix's personal estate was more than sufficient to pay her funeral expenses, debts, and charitable legacies. *Philip Dixon* died, having appointed his three children his executors: *William Dixon*, the eldest son and heir at law, afterwards died, leaving *Sarah* the wife of *John Slavin*, his heir at law and personal representative. One of the questions was, who was entitled to the produce of the real estate? One point raised was, that when the testatrix made the produce of her real estate first applicable to the payment of her funeral expenses, debts, and legacies, except charitable legacies, her only purpose was to secure the payment of her charitable legacies by means of relieving the personal estate; and that when the charitable legacies were all paid, it was not her intention that the surplus of her personal should be relieved from the payment of her funeral expenses, debts, and legacies, at the expense of her real estate: but Sir *John Leach* V. C., after observing that that might probably have been her purpose, said that the Court could not controul her intention clearly expressed by any conjecture, and he decided accordingly; and further, that the personal representative of *Philip Dixon*, the heir at law, was entitled to the surplus produce of the real estate, as money. Another point decided was, that the produce of the real estate, included that of *leaseholds*, and was primarily applicable in payment of the funeral expenses, debts, and legacies not charitable, the words of the devise comprehending the *leaseholds:* the words were, "All my messuages, dwelling houses, buildings, lands, tenements, hereditiments, and real estate, whatsoever and wheresoever, and of what nature or kind soever, not hereby otherwise disposed of." His Honour observed, that it might be stated on the authorities, that those general words unaided by other parts of the will, would not include chattel leases, but in that case he thought the intention was to include them.

SECT. IV. Right of the Heir or of the Devisees of Proceeds from a sale of land to *lapsed* Interests.

Having discussed, in the preceding sections, the rights of the testator's heir, devisee, residuary legatees, and next of kin, to the produce of real estates directed to be sold, the subject which next presents itself to notice, is, the title of those persons to so much of the proceeds as *lapses* by the deaths of parties, or is *undisposed* of, from the illegality of the objects or purposes, or from the neglect of the devisor.

The right of the heir or devisee of the estate to lapsed interests was treated of in the first section.(*i*) We shall, therefore, first, consider under the present title—

The right of the heir or the devisees of the proceeds from the sale of land after answering particular purposes, to such parts of those proceeds as *lapse*, or cannot take effect, whether the surplus produce

(*i*) p. 351.

only be given to the devisees, or whether it be bequeathed to them together and blended with the personal estate.

In consequence of the heir's title to every interest in freehold lands not effectually disposed of, it seems to be settled, that although money, to arise from the sale of them, be devised to individuals distinctly from or together with the personal estate, after satisfaction of particular trusts previously declared; yet, if any of those trusts lapse by the death of *cestui que trusts*, or be void, as when given to charities, or are for any reasons disappointed, the heir will be entitled to those interests, as so much real estate undisposed of; and for the following reasons: the conversion of the real estate into personal, was merely intended by the testator for the benefit of the several persons named in his will; and as nothing is given to the devisees or legatees of the real proceeds, except what *remains* after the prior purposes are answered, all those purposes are excepted out of the bequest; hence such of the trusts as lapse or cannot take effect, being interests in lands of which no disposition is made, necessarily result to the heir. The present differs from the case before considered,(*k*) of a beneficial devisee of lands, subject to particular charges, who is entitled to lapsed or disappointed interests, for there the devisee is substituted in the place of the heir, the latter being wholly disinherited; but in the instance now under consideration, the gift to the devisees or legatees is only of so much of the produce from the sale of the lands, as *remains* after satisfaction of the particular trusts or purposes.

In support of the above remarks we shall begin—

1. With producing an instance where the persons beneficially interested in the surplus money arising from the sale of real estate, were adjudged not to be entitled to so much of it as consisted of a sum reserved for a future disposition by the settler, but which failed by his neglect to dispose of it.

The case alluded to is *Emblyn* v. *Freeman*,(*l*) in which *Joshua Aylsworth* conveyed lands to trustees, upon trust to sell after his death, and to pay out of the proceeds a mortgage and other specialty debts, also several sums of money to his relations and to charities; and directed the remainder of the money to be divided among the plaintiffs, *after* payment by his trustees of 200*l.* to such person or persons as he should appoint by a note under his hand. No appointment was made of that sum, and it was decreed, first by the Master of the Rolls, and afterwards by the Chancellor, that the 200*l.* resulted and belonged to the heir at law.

So in the City of *London* v. *Garway*,(*m*) *Thomas Garway* devised lands to three persons in trust to sell and pay the proceeds to such persons as he, by a subscribed paper, should appoint; but if he left none, then in trust for his four nephews. The testator appointed sums of money to several persons, which were far inferior to the value of the lands; so that there was a considerable surplus of the money which arose from the sale, and which the Court decreed to the heir as so much real estate, not passing by the residuary clause, and therefore undisposed of.

In *Hutcheson* v. *Hammond*,(*n*) Mrs. *Hutcheson*, under a power in

(*k*) *Supra*, p. 351.
(*l*) Pre. Ch. 541.
(*m*) 2 Vern. 571.
(*n*) 3 Bro. C. C. 128. 143-147.

her marriage settlement, appointed to trustees certain real estates, in trust to sell after her decease, and place the produce in the funds, with a direction to pay the dividends to her husband for life; and to dispose of the principal after his death in discharging two legacies of 1500*l.*, another legacy of 500*l.* and 1000*l.* to *Grace Parker* (who died before the testatrix,) and to pay the residue of the *principal* equally among the younger sons of *William Hammond*, with benefit of survivorship; but if they all died before the same became payable, then to pay it to *Peter Hammond*, his executors, &c. One of the questions was between the residuary legatees of the money arising from the sale of the estate, and the heir. The former claimed the 1000*l.* as personal estate, in the character of particular residuary legatees of the fund, under the supposed apparent intention of the testatrix absolutely to convert and dispose of it as personalty; while the latter claimed the lapsed interest as so much real estate undisposed of. *Buller*, J. determined in favour of the heir; a decision afterwards confirmed by Lord *Thurlow*.(*o*)

His Lordship considered the direction for sale of the land and the investment of its produce in the funds to be merely for the purpose of arrangement, and not with an intent to alter the rights of the parties, by an absolute conversion of the real into personal estate. The property, therefore, continuing land subject to the specific trusts declared of its produce, the residuary devisees of that produce could (as before observed) claim only what *remained*, after deducting so much as was necessary fully to discharge *all* those trusts. But one of them happened to lapse, and in consequence, part of the real proceeds being undisposed of, the heir was the only person who could make an effectual claim. His Lordship observed, that if a testator *blend* his real with his personal fund (which was not that case,) and make a residuary legatee, the appointment will carry all that is not disposed of. An observation perfectly correct, when understood in a qualified sense, as will afterwards appear; for the blending and disposition of the two estates is a material step towards effecting a total conversion of the real estate into personal; but the circumstance of itself is not sufficient for the purpose, as will be next shown.

Such being the rule of equity in favour of the heir, as before detailed in regard to lapsed interests, when the surplus from the sale of land is specifically and *distinctly* devised from him, the next subject for enquiry is—

2. The rights of residuary legatees of money arising from the sale of real estate after satisfaction of particular purposes, and of executors or next of kin of testators to partial *lapsed* interests, when the proceeds of the lands are blended with the personal estate.

It is a clear rule in equity, where real estate is directed to be converted into personal, for an *express purpose* which fails, to consider, although the land has been sold, the disappointed interest as realty,(*p*) and resulting to the heir, as was noticed in considering the rights of mere residuary devisees of the produce of real estate to lapsed interests. The rule equally applies to cases where the real proceeds are blended and bequeathed with the personalty after

(*o*) See also *Jones* v. *Mitchell*, 1 Sim. and Stu. 290. (*p*) 1 Ves. & Bea. 174.

answering particular objects, and the context of the will affords no manifestation of the testator's intention absolutely to convert and dispose of his real as personal estate; for then the conversion of the real and personal property being presumed to be made for the special purposes described, and to continue land in every other respect, if one of them lapse or fail, it is manifest that the residuary legatees cannot claim it; not as personal estate, because it does not fall within that description; nor as land, since they were only intended to take so much of the proceeds as remained after the previously declared purposes of their application were satisfied. The executor is excluded, since, if it were personal estate, he is precluded from taking lapsed interests;(*q*) and with respect to the next of kin, their title is defective, as the disappointed bequest is no part of the personalty, but of the real property.(*r*) The heir, therefore, is the only person entitled to it. The following cases are produced in confirmation of the above remarks.

In *Cruse* v. *Barley*,(*s*) *William Banson* being indebted by mortgages, bonds, and simple contract, devised his freehold and copyhold lands to *Barley*, in trust to sell, and to discharge in the first place all his incumbrances and debts. He then bequeathed his personal estate to the same trustees, to sell, and after payment of debts to apply the proceeds, and also the money to arise from sale of the real estates, among his (the testator's five children; viz. to his eldest son *Christopher* 200*l.* at the age of twenty-one, and all the *residue* thereof among his four younger children at the same age, with benefit of survivorship. *Christopher* died before twenty-one, and what was to become of the 200*l.* was the question? Sir *Joseph Jekyll* was of opinion, that the residuary legatees were not entitled to that sum, as nothing was given to them but the remainder after the deduction of the 200*l.*; and he finally determined, after looking into precedents, that the money belonged to the testator's heir, as so much real estate undisposed of.

Similar to the last case is *Gravenor* v. *Hallum*,(*t*) in which *Robert Goldsbury* devised to his executors his freehold dwelling house (subject to bequests to charitable uses, void by the Statute of Mortmain), and also all other his real estates, in trust to sell, directing the rents, till sale, and the residue of his personal estate, to be applied, in the first place in payment of his debts, funeral expenses, and the costs of his executors and trustees; and in the next place, in discharge of his legacies, which were numerous. He then gave the residue of the money arising from sale of his real estates, and their rents, till sold, and of his personal estate, *after* such deductions as aforesaid, to be divided and paid as mentioned in his will. The question was, whether the heir or the residuary legatees were entitled to so much of the real proceeds as were given to charities, and consequently undisposed of. And Lord *Camden* decided for the heir, upon the principle before stated; observing, that he rested his opinion altogether upon the intention of the testator, and the strong reluctance in the Court to disinherit an heir at law.

The next is a very strong case in favour of the heir against the

(*q*) 1 Atk. 469. 18 Ves. 254, 255.
(*r*) 18 Ves. 165. 1 Ves. & Bea. 173.
(*s*) 3 P. Will. 20. 1 Bro. C. C. 512.
(*t*) Ambl. 643.

claims of the residuary legatees of the personalty, and is probably such a decision as would at present be disapproved of;(*u*) for, although the testator declared that the proceeds from the sale of his real estate should be considered as *part of his personal* estate, subjecting both of them to the payment of legacies, and disposing of his residuary personal estate; yet it was determined, that a sum of 1000*l.* reserved by the testator for his future appointment, of which he made none, did not fall into the residue, as part of the personal estate, but resulted to the heir.

The case alluded to is *Collins* v. *Wakeman*,(*x*) in which the testator devised real estates to one *Collins* in trust to sell, declaring the produce to be considered "as part of his personal estate; and thereout and out of his personal property he gave several legacies, some to his next of kin, and one to his heir, *John Reeve*. He then devised a copyhold estate to the same trustee to sell, ordering the proceeds "to be considered, from the period of sale, as other part of his personal estate," to be applied in discharge of several legacies. Besides those legacies he gave others "out of his said trust monies and personal estate," and bequeathed to *Collins* 1000*l.* to be disposed of according to any written instructions that he (the testator) might leave. He then gave his residuary personal estate to *Mary Wakeman* absolutely, and died, without disposing of the 1000*l.* which was claimed as personalty by the residuary legatees and next of kin. But Lord *Rosslyn* was of opinion that the money belonged to the heir as so much land undisposed of.(*y*)

A testator however having the power, as before observed,(*z*) to change the nature of his real estate into personal to all intents and purposes, and to dispose of it as personalty, so as to prevent a resulting trust to the heir, it follows, that if he show an intention to do so, and make the disposition, his residuary legatee of the personal fund will be entitled to the benefit of all interests affecting the proceeds from the real estate which lapse or are disappointed.

An instance of such a conversion of the real property occurred in the case of *Kennell* v. *Abbott*,(*a*) where Mrs. *Hickman*, erroneously supposing herself to have been lawfully married to a second husband *Edward Lovell*, but who had a wife by a prior marriage then living, bequeathed 300*l.* stock to her niece *Betty Kennell*, for life, and to her nephew *Martin Togood*, leasehold property. She then gave a copyhold estate to her brother *Thomas Abbott*, in trust to sell, and pay out of the purchase money legacies to particular relatives, also one legacy of 150*l.* "to her *husband Edward Lovell*," which failed in consequence of his not being her lawful husband. The testatrix, after giving a leasehold estate to her great niece *Catharine Kennell*, bequeathed all her household goods, plate, furniture, and stock in husbandry, to *Thomas Abbott*, in trust to sell, and out of the produce to insert the life of her great niece in the leasehold estate. She then bequeathed her wearing apparel and linen to *Betty Ken-*

(*u*) See *Att. Gen.* v. *Holford*, 1 Price, 426.
(*x*) 2 Ves. jun. 683, acknowledged by Sir *W. Grant* in *Hooper* v. *Goodwin*, 18 Ves. 166. 1 Jacob, 375.
(*y*) See also *Hill* v. *Cock*, 1 Ves. & Bea. 173. stated *supra*, p. 360.
(*z*) *Ante*, p. 359. (*a*) 4 Ves. 802-810.

nell, and gave the *residue* of the money arising from the sale of the copyhold estate, household goods, and furniture, and the *residue* of her personal estate whatsoever and wheresoever, and which she had power to dispose of, to her niece *Betty Kennell*, subject to debts and funeral expenses, and appointed her sole executrix. The disappointed legacy of 150*l.* was claimed by *Betty Kennell*, the residuary legatee against the heir, upon the principle of its appearing from the will, that the testatrix meant a thorough conversion of the copyhold into personal estate. And of that opinion was Lord *Alvanley*, M. R., who decreed in her favour, upon the authorities of *Mallabar* v. *Mallabar*,(*b*) and *Durour* v. *Motteux*.

His Honour remarked, in the last case, that the testatrix had bequeathed several particular parts of her estate, stock, leasehold estates, household goods, furniture, and other articles; also the copyhold estate which she ordered to be sold in all events, and the legacies to be paid out of the purchase money. Then came the residuary disposition. Under these circumstances, he thought the real estate was made personal to all intents and purposes; and that such was the testatrix's intention; since, she taking a retrospective view of what she had done, and meaning to give every thing not disposed of, inserted the residuary clause; so that, the real proceeds, forming part of the personal estate entitled the residuary legatee not only to every thing not expressly disposed of, but also to all interests lapsed, and to each part of the personal fund by any means not effectually given. To which may be added the inference deducible from the circumstance of *Betty Kennell* being named *executrix* as well as residuary legatee; the effect of which is detailed in Lord *Talbot's* judgment in the case of *Mallabar* v. *Mallabar*, stated in a preceding page.(*c*)

But the case of *Durour* v. *Motteux*,(*d*) does not perhaps furnish so strong an indication of intention as the last. There Mr. *Motteux* devised all his real estates to trustees to sell, and to dispose of the *whole*, with his personal estate to pay debts and legacies and to perform his will. He gave legacies, and among them 1200*l.* which could not take effect, as being given to a charity and directed to be laid out in the purchase of land. The remainder of the lands were also appropriated to charitable purposes; and the testator directed his trustees to place out *all* the *residue* of his estate and interest thereon upon securities, and divide among several persons. To whom the 1200*l.* belonged was a question between the heir and residuary legatees. And Lord *Hardwicke* determined in favour of the latter, being of opinion that the money to arise from the sale of the real estate was, and was intended by the testator to be, converted into personal; his Lordship observing that the intent to include the *whole* in the residue plainly appeared from the testator's description of *all* his personal estate, so that the whole of the real was to be considered as personal property.

The last is a case very imperfectly reported, and it may be reasonably presumed that so acute and able a judge as Lord *Hardwicke*,

(*b*) Forrest, 78.
(*c*) *Supra*, p. 356.
(*d*) 1 Ves. sen. 321, stated from the Register Book, 1 Sim. & Stu. 292, *Jones* v. *Mitchell*.

would not have disinherited the heir upon the sole ground of the testator in disposing of residuary property having made use of the word *all*, as the report of his judgment seems to imply. Doubtless there were other circumstances that influenced his opinion, which are not expressed in the printed narrative. Sir *William Grant*, in commenting upon this case, spoke to the following effect: "From the little Lord *Hardwicke* is reported to have said, it is difficult to ascertain from what expressions he inferred, that by the description of all his personal estate, the testator meant to include every thing in the residue. If any stress is to be laid upon the word *all*, it does not occur here; but that the decision is generally accounted for by the particular manner in which the sale was directed, and the circumstance of the testator having blended the real and personal estates in one gift to trustees, to sell the *whole* with his personal estate, &c."(*e*)

Having attempted to ascertain the persons to whom belong partial interests, affecting lands, that lapse or are disappointed, the next subject of inquiry is,—

3. The rights of *surviving* devisees or legatees of the produce arising from the sale of real estate, whether of the specific proceeds only, or as residuary legatee of the personalty, to shares that *lapse* by the death of their companions.

FIRST, when the devisees or legatees are made joint-tenants.

In the last chapter (*f*) it was shown, that if property be given to several persons in joint tenancy, and one of them die before the testator, his intended share will belong to the survivors, upon the principle, that each legatee or devisee is a taker of the *entire* fund, and not of distinct parts of it. Hence it follows, that if the proceeds from the sale of land be devised to *A.* and *B.* either specifically, or as part of the residuary personal estate, and *A.* die before the testator, his share will not lapse to the heir or next of kin of the devisor, but belong to *B.*(*g*) This, however, is not so, when the devisees or legatees take their interests in severalty without benefit of survivorship, which happens—

SECONDLY.—When the produce from land directed to be sold is devised to two or more persons as mere tenants in common, either specifically or as part of the residuary personal estate. The principal of the distinction, with the exceptions to it, are stated in the fourth section of the last chapter.

An authority upon this subject is *Digby* v. *Legard*,(*h*) in which *E. B.* devised her real and personal estates to trustees in trust to sell, to discharge debts and legacies, and to pay the residue to five persons in *equal* shares. One of them died before the testatrix, and Lord *Bathurst* held at the hearing of the cause, and afterwards upon a rehearing, that the share of the deceased residuary legatee in the real estate resulted to the testatrix's heir.

The last case was approved of in the leading authority of *Ackroyd* v. *Smithson*.(*i*) The testator, after bequeathing several general legacies, gave all his real and all his personal estate to two persons, in

(*e*) 1 Ves. & Bea. 417. and see 1 Bro. C. C. 500. (*f*) Sect. 4.
(*g*) See cases collected in the section last referred to.
(*h*) 3 P. Will. 22. *in notis*, Ed. by Cox, 18 Ves. 166. (*i*) 1 Bro. C. C. 503.

trust to sell and convert such two estates into money, and to pay out of the proceeds of the sale all his debts, legacies, and funeral expenses, and the charges of proving his will; and after such payments, and retaining 50*l.* each for their trouble, in trust, out of such monies as aforesaid, to pay all legacies and annuities given by his will; and if there remained a surplus in the hands of his trustees, as he conceived would be the case, and to a considerable amount, he gave it to his several legatees (naming them) "in proportion to their several and respective legacies," with a direction for payment within six months after the residue could be ascertained. By this bequest the residuary legatees were entitled as tenants in common. Two of them died before the testator, whose shares were claimed by their next of kin, the testator's heir, and also the surviving residuary legatees; and Sir *Thomas Sewell*, M. R., decided in favour of the last. But the next of kin, being dissatisfied, appealed from the decree, and the cause was reheard before Lord *Thurlow*, who determined, in consequence of the celebrated argument of Mr. *Scott* (now Earl of *Eldon*,) that the two shares lapsed, and resulted to the heir and next of kin; *i. e.* such parts as were real produce to the heir, and such as were personal to the next of kin.

The foundation upon which his Lordship's opinion rested in regard to the real proceeds, seems to have been,—first, that the claims of the surviving residuary legatees could not be supported, since they, being tenants in common, were only entitled to the several shares bequeathed to them. Secondly, that the title next of kin was equally defective; as the conversion of the real into personal estate being merely to answer the special purposes, and to be distributed among particular persons, so much of the real proceeds as were not required for any of those objects retained the quality of land; whence it followed, that as the right of the next of kin was confined to personal property undisposed of, the lapse of the two residuary shares, so far as they consisted of real estate, could not result or belong to them. And thirdly, that as there was no person who could claim such parts of those shares as were the produce of the land, they necessarily resulted to the heir.

The last case was followed by *Williams* v. *Coade*,(*k*) in which Sir *William Grant* made a similar decree.

It is to be noticed that the two last-stated authorities were cases of lapse by death before the testator.

Sect. V. Right of *personal representatives* of devisee or legatee of real proceeds in preference to testator's heir.

Suppose the residuary legatee in the first case had survived the testatrix, and died immediately afterwards, or before a sale of the real estate; or, that the two residuary legatees in the second had died within the six months after the surplus was ascertained; it is presumed, that no lapse would have taken place, and that the personal representatives of the legatees would have been entitled to the shares as money, since the land was converted into personalty to the extent of being applied and distribnted in the manner, and for the objections and the purposes mentioned in the wills.(*l*)

(*k*) 10 Ves. 500.

(*l*) See 1 Price, 483.

For the same reason, when real estate is converted and disposed of as personal to all intents and purposes, and is so given that the residuary legatee takes a *vested* interest before his death; although he die before the period of payment arrives (as during the continuance of a tenancy for life,) his personal representative, and not the heir of the testator, will be entitled to it as part of the personal estate bequeathed to him.

Such an instance occurred in *Fletcher* v. *Ashburner*,(*m*) determined by Sir *Thomas Sewell*. In that case, *John Fletcher* devised his burgage houses and free rents in *Kendall*, and all his personal estate, to trustees, to sell so much as should be sufficient to pay his debts, and to permit his wife *Agnes* to enjoy the residue for life, and then to sell the same, and pay the proceeds to his children *William* and *Mary*, equally, after deducting expenses and half a guinea to each trustee for their trouble. But if his wife married again, the trustees were immediately to sell all his estate and effects given to her for life, and to pay the remainder of the proceeds, after making the above deductions, to his said wife and two children in equal proportions, with a cross limitation of the share to the surviving child, upon the death of either before his or her proportion became due. The wife continued a widow. *William*, the testator's heir, and a devisee, died before the wife, after attaining twenty-one; and *Mary*, after attaining that age, died unmarried before her mother and brother. The widow was the sole next of kin of *William*, who survived his sister, and was entitled to their shares of the money produced from a sale of the real estate, if it were to be considered as personal; but the heir of the testator, who was also heir of *William*, insisted that he was entitled to them, as so much realty undisposed of. And Sir *Thomas Sewell*, M. R., determined, that this was a case of absolute conversion of the real into personal estate; that *William* the son had the whole beneficial title *vested* in him *as money*, subject to his mother's estate for life or during widowhood; and that as she survived him, and was his sole next of kin, the interest that vested in him became vested in her, which entitled her personal representative to the whole fund as money.

We shall next consider—

SECT. VI. When produce from sale of land resulting to Testator's *Heir*, is to be considered *land* or *money*.

The nature and quality of the interest which heir of the testator takes in the real property resulting to him, *i. e.* whether as land or money; for if as land, and he die intestate, it will descend to his heir; but if as money, it will pass by his will, or go to his next of kin upon his intestacy.

From what has been detailed in the preceding pages of this chapter, the following conclusions will probably be found correct; and are submitted to the reader's consideration under the ensuing arrangement:

(*m*) 1 Bro. C. C. 503. and see *Brown* v. *Bigg*, 7 Ves. 279-287. *S. P.* also *Van* v. *Barnett*, 19 Ves. 102-111. *Att. Gen.* v. *Holford*, 1 Price, 483, stated *infra*, p. 373.

1. When conversion of the real estate is directed for particular purposes, and there is no disposition of the surplus.

Where a testator devises his real estate in trust to be sold to pay debts and legacies, and dies intestate as to the excess, his heir will take it as land; for there being neither intention to change the nature of the property, nor any disposition of it beyond those purposes, it necessarily retains its real quality.(*n*)

So also, if any of the legacies lapse, they will result to the heir as land; for the conversion of the real estate being made for specific objects only, and not out and out, the land retains its primitive nature until called upon to answer the particular purposes to which it was subjected by the testator; if, then, any of them fail, there is no necessity for a sale of so much of the real property, which continuing land, as before observed, results in that quality to the heir.(*o*)

2. When the surplus of lands directed to be sold for particular purposes is disposed of, either alone or with personal estate.

If the residue of the real proceeds be so given, as to show the testator merely intended the residuary devisee or legatee to make what remained after satisfaction of prior trusts or charges, and any of them lapse or fail, they will result to the heir as land, for the reasons before noticed, which entitle him to lapsed interests, where no disposition is made of the residuary real property (*p*).

And when the surplus real proceeds are devised to *one* person, who dies before the testator, and there is no intention to be collected from the will that the devisor meant a complete conversion of his real into personal estate, and to dispose of the real produce as personalty, the lapsed residuary real proceeds will result to the heir as land, upon the same reasoning that a court of equity gives him the like produce where no disposition is made of it.

But when the money arising from the sale of freehold lands, after answering particular purposes, is given to persons as tenants in common, and one of them dies during the life of the devisor, it has been decided that the *heir* and surviving devisees take their shares as *money*, upon the following presumption; that the motive of the testator, in making the disposition, was for the convenient division of the property among the devisees, a purpose still continuing notwithstanding the substitution of the heir in the place of the deceased devisee. Hence, if the net real proceeds were given to *A.* and *B.*, as tenants in common, and *A.* died before the testator, the heir of the testator and *B.* would take the whole as money (*q*).

The above presumption however would fail, if both *A.* and *B.* died during the life of the devisor, (events which would occasion a total lapse of the residuary real proceeds;) because the convenience of division no longer existing, and no sale being necessary for the accommodation of *A.* and *B.*, the case becomes simply that of a conversion of lands to pay debts, &c. without any disposition being made of the surplus, which we have seen will result to the heir as land (*r*).

(*n*) 3 Bro. C. C. 143. 16 Ves. 191.
(*o*) 4 Madd. 492.
(*p*) Pre. Chan. 541. 1 Ves. & Bea. 174. 3 P. Will. 20-22. 4 Madd. 492.
(*q*) 4 Madd. 493.
(*r*) 1 Bro. C. C. 509. 10 Ves. 500-505.

The decision of Sir *John Leach*, V. C., in *Smith* v. *Claxton* (*s*), appears to have been founded upon the distinctions before mentioned. There, *Thomas Smith* bequeathed his residuary personal estate, and devised a part of his freehold property in *S.* to trustees, in trust to sell both funds, and to pay his debts, funeral expenses, and legacies out of the produce, and the residue to his *wife*. He then gave the remainder of his lands in *S.* to trustees, to pay the rents to his wife for life, remainder to his son and heir *Thomas* for life, and to sell the same after his death, and pay the proceeds to *Robert* (son of *Thomas*), and all the other children of *Thomas*, in equal shares; their interests to be vested at the ages of twenty-one; but if all of them died before taking vested interests, the money to arise from the sale was to be in trust for the testator's sons *Joseph* and *Robert*. The testator also gave to the same trustees other freehold and some leasehold estates, in trust, after discharging an annuity, to pay the rents to his son *Robert* for life, and then to sell and pay the produce equally among *Robert's* children (if any), but if none, to hold the money in trust for the testator's sons *Thomas* and *Joseph* in equal shares. The personal estate being sufficient to satisfy the debts, &c. so as to render a sale of any part of the freehold lands unnecessary; three questions arose, and were decided in consequence of resulting trusts to the heir occasioned by the deaths of the testator's wife, his son *Robert*, and his grandson *Robert* the son of *Thomas*, during the life of the testator. The first of those questions was, whether that part of the freehold estates in *S.*, the ultimate proceeds from the sale of which were devised to the wife, resulted to the heir as land or money? And the Court held (upon the principle before stated in the supposed case of a devise to *one* person of the surplus real produce which lapsed by his death) that the heir took as *land* so much of the real proceeds as were intended for the wife. With respect to the second question, *viz.* in what quality the remainder of the real estate in *S.* resulted to the heir first by the death of *Robert* the grandson and only child of *Thomas*, and then by the death of *Robert* son of the testator to whom and *Joseph* the produce from a sale was ultimately devised in common, it was decided, upon the reasoning before stated as applicable to such a case (*t*), that the heir took *Robert's* (the son's) intended share as money. The like decision was made on the third question that arose upon the devise of real proceeds to *Thomas* and *Joseph* in common (*Thomas* having died without children, after surviving the devisor) and which was, in what quality *Thomas* as heir took the moiety of those proceeds; and the Court declared, upon the principle it decided the second question, that the share belonged to him as *money* (*u*).

In the late case of *Dixon* v. *Dawson*, Sir *John Leach*, V. C. observed, "I adhere to the principles which I stated in the case of *Smith* v. *Claxton*, that where the whole land is properly sold by the trustees, and there is only a partial disposition of the produce of the

(*s*) 4 Madd. 484. 493.

(*t*) *Ante*, p. 370.

(*u*) The other cases upon this subject, are *Hewitt* v. *Wright*, 1 Bro. C. C. 86. *Wright* v. *Wright*, 16 Ves. 188. *Jones* v. *Mitchell*, 1 Sim. & Stu. 290. *Dixon* v. *Dawson*, 2 Sim. & Stu. 340.

sale, there the surplus belongs to the heir as money, and not as land;" and his Honour declared that the surplus in the case before him, therefore, belonged to the personal representative of *Philip Dixon*, the heir.

3. It was an observation of the Court in the case of *Smith* v. *Claxton*, that the heir and *Joseph* might have agreed to take the land in its primitive and natural state: a right of which there is no doubt. The effects of such their election would have been to discharge the land from the nature of personalty impressed upon it by the operation of the will; and the share of each would have descended to his heir or passed by his will as real estate.(*x*) Slight circumstances will be sufficient to effectuate the above purpose, and notwithstanding the dictum of Lord *Hardwicke* to the contrary,(*y*) even *parol* declarations;(*z*) yet, trivial as they may be, it is necessary that they clearly indicate the intention of the parties to accept and enjoy the fund as real property.(*a*) If, then, lands be devised to trustees to sell and divide the proceeds between *A.* and *B.*, and the heir of the testator become entitled to *A.'s* share by lapse, and the heir and *B.* do no other act, expressive of their intention to take their shares as realty, but by entering upon and occupying the property, the case of *Kirkman* v. *Miles*(*b*) purports to be an authority that the land will be the personal estate of the heir and *B.*

Sect. VII. When the *devisees* of the real produce take it as land or money.

What has been said, in regard to the testator's heir and surviving devisees, equally applies to instances where there is no lapse, but the devisees of the real produce survive the devisor; and the case of *Kirkman* v. *Miles* is one of that description. There the devisees of the money to arise from the sale of freehold property entered and continued in possession of the estate for two years; and Sir *William Grant* was of opinion, that the period was too short to presume an election.(*c*)

In *Van* v. *Barnett*,(*d*) Lord *Eldon* remarked that it was not competent for an infant to make election.

And it appears, from the case of *Oldham* v. *Hughes*,(*e*) that, without the interposition of a court of equity, coverture is a disability to a woman's electing to change the nature of her property.

Neither can a lunatic make such election.(*f*)

When a residuary legatee takes the proceeds from the sale of lands as money, under the operation of the will, his election to take the estate as land will not prejudice the right of the crown to the legacy

(*x*) 3 Atk. 447. 1 Bro. C. C. 236. 8 Ves. 236. 2 Meriv. 531.
(*y*) *Bradish* v. *Gee*, Amb. 229.
(*z*) 2 P. Will. 174. 1 Bro. C. C. 236. 8 Ves. 236. 19 Ves. 109. 7 Bro. Parl. Ca. 557.
(*a*) 12 Ves. 165. 2 Meriv. 521-531. 7 Bro. Parl. Ca. 558. 8vo. ed.
(*b*) 13 Ves. 338.
(*c*) Upon this species of presumption see observations, 7 Pro. Parl. Ca. 559. 8vo. ed.
(*d*) 19 Ves. 109. See also Ambl. 241. *Earlom* v. *Saunders* *Carr* v. *Ellison*, 2 Bro. C. C. 55.
(*e*) 2 Atk. 453. See also 1 Ves. sen. *Cunningham* v. *Moody*, 174.
(*f*) *Ashby* v. *Palmer*, 1 Meriv. 296.

duty imposed by the 55 Geo. 3, ch. 184, sched. 3, upon the clear residue of money to arise from the sale of real estates.

That point was settled in the *Atterney General* v. *Holford*,(*g*) by the Court of *Exchequer*. *George Bogg* devised and bequeathed to trustees all his estate, freehold, leasehold, or otherwise denominated, consisting in part of a share in the New River water-works (which was freehold,) upon trust to make an immediate sale; and he declared that the profits should be deemed part of the residue of his estate thereafter disposed of, or go in aid (if necessary) of the rest of his property in discharge of legacies; and after bequeathing certain legacies, he gave the residue of his estate and effects, whatsoever and wheresoever, to *Josiah Holford*, his heirs, executors, &c. The personal estate was more than sufficient to pay the debts and legacies. And the question was, whether, as *Holford* chose to take the New River share as realty, his election should defeat the legacy duty? And the Court decided in the negative, upon the principle that the fund was in equity absolutely converted into personal estate by the will; and that, although *Holford* might prevent a sale by electing to take the share as it was, yet, it being money, which would go to his personal representatives if no such election were made, the exercise of that power could not be permitted to disappoint the duty which would attach upon the proceeds received by *Holford* from a sale of the property, which, so far as regarded the duty, ought to be considered as made.

CHAPTER X.

Of vested Legacies payable out of the Personal Estate.

IT will be attempted in this chapter to ascertain the circumstances, under which a legacy will be vested or contingent, *i. e.* when the interest of the legatee will be so fixed as to be transmissible to his personal representative, although he die before the period arrives for payment of the money; or when, from the terms of the bequest, or from the uncertainty of the event, upon which the legacy is made payable, no immediate interest passes to the legatee, but his title to the legacy depends upon his being in a condition to receive it when due.

In discussing these subjects, the following arrangement will be pursued:

SECT. I. When the gift of a Legacy is *immediate*, and *no time* appointed for payment of it.

SECT. II. When the gift of the Legacy is *immediate*, and the *payment* of it *postponed* to a future period, whether definite or uncertain.

1.—*When the legacy will be vested—*
As when directed to be paid at twenty-one,—Or
At the end of a particular term,—Or
So soon as debts are paid,—Or

(*g*) 1 Price, 426. 435.

So soon as the executors shall possess sufficient assets,—Or
So soon as particular lands are sold,—Or
So soon as the personal residue shall be laid out in the purchase of lands.

2.—*When not vested.*

SECT. III. Where there is *no immediate express gift* of the Legacy distinct from the time appointed for its payment.

FIRST.—When *contingent* from the effect of conditional words.

SECOND.—When vested in consequence of those words not having been used by testators in a conditional sense.

1.—*When the legacy is given to a trustee, parent, or guardian for the legatee at a particular time and to be managed or applied for his maintenance or benefit,*—Or

2. *Where the intermediate interest is not given for the use or benefit of the legatee, but to another person,*—
During the legatees minority,—Or
Until particular purposes are fulfilled,—Or
During life;—and then
IN REMAINDER *to the legatee.*

3.—*Exceptions to the general rule of a remainder and particular interest, or estate vesting at the same time, upon the intention of testators.*

SECT. IV. Of the vesting in interest and transmissibility of contingent executory Bequests.

SECT. V. Effect upon the *vesting* and *devesting* of Legacies, when they are subjected to a *limitation over* on the happening of a particular event. And—

1.—*Where the gift is immediate, with a limitation to "survivors" upon the death of any of the legatees under twenty-one, &c.*

2.—*Where the event, upon which a legacy is given over, is so imperfectly conceived and expressed, as to render the testator's intention mere conjecture or impracticable to perform.*

3.—*Where the limitation over is, if the legatee die before receipt of the money, or before the sale of an estate.*

4.—*Where the limitation over is, in case of the death of the legatee generally.*

5.—*Where the limitation over is, "in case the legatee die unmarried, and without having children or issue."*

6.—*When the contingencies, upon which legacies are*

limited over, were held not to have happened, so as to divest the interests first given; And

7.—*Construction of the words "payable," &c. in reference to the event introducing a limitaton over of legacies or portions, as, if any of the legatees die before their shares become payable, or payable, assignable, and transferable.*

FIRST,—*Of Legacies.*

SECOND.—*Of Portions.*

SECT. VI. Effect of POWERS OF APPOINTMENT on the vesting and devesting of Legacies and Portions.

1.—*Where the power is merely to ascertain the shares each legatee is to take.*

2.—*Where the gift depends upon an execution of the power.*

SECT. VII. As to vesting generally.

1.—*Instances of vested interests determining with the lives of the legatees, and not transmissible.*

2.—*When the word "survivors" construed the same as "others" in favour of vesting.*

3.—*Where a legacy is directed to be sunk in the purchase of an annuity.*

4.—*When a legacy is given generally "to be at the disposal of the legatee."*

5.—*Where a legacy is expressed to be given to answer a particular purpose for the benefit of the legatee, which purpose is disappointed and cannot take effect.*

SECT. I. When the gift of a Legacy is *immediate,* and no time appointed for payment of it.

In bequests to individuals, without specifying the periods when the money is to be received, it is payable at the end of a year next after the testator's death. This allowance to executors and administrators is merely for convenience, in order that the debts, entitled to a priority to legacies, may be ascertained, and the personal representatives of the testator may be acquainted with the amount of the assets, so as to be able to make a proper distribution of them. This delay of payment being adopted as a necessary and convenient arrangement for the due administration of the estate, and for no other purpose, will not prevent the legacies from vesting at the death of the testator.(*a*) Hence, if a fund be given to the children of *A.* those living when the testator died will take vested interests in it, which will entitle the personal representatives of such of them as happen to die within the year after the testator's decease to their shares. The cases upon this subject are collected in the second chapter of this work, which treats of the "Description of Legatees,"

(*a*) 10 Ves. 13.

and the periods when they are required to be *in esse* for the purpose of taking under the description.(*b*)

Sect. II. When the bequest is *immediate*, and *payment* of the legacy is alone postponed.

Courts of equity not being possessed of exclusive jurisdiction in testamentary matters, but the Ecclesiastical Court holding a concurrency with them on subjects of this nature, have, in order to preserve uniformity of decision, adopted some of the rules of the latter tribunal, which were taken or borrowed from the *Roman* law. In consequence of this adoption, courts of equity have established a positive rule of construction.

1. That when a legacy is given to a person *to be paid* or *payable* at or when he shall attain the age of twenty-one, or at a future *definite* period, the *interest* in the legacy shall be considered to be vested in the legatee immediately upon the testator's death, as *debitum in præsenti solvendum in futuro*, the *time* being only annexed to the *payment*, and not the *gift* of the legacy. Hence it appears, that if the legatee happen to die before the payment arrives, his assignee or personal representative will be entitled to the legacy.(*c*)

Thus in *Bolger* v. *Mackell*,(*d*) the testatrix gave her residuary estate to *Catherine*, the daughter of *James Winter*, and to the legitimate children of her (the testatrix's) brothers *John* and *James Snowden*, in equal shares, the proportions of sons with the interest or accumulations, *to be paid* at their ages of *twenty-one*, and those of daughters at twenty-one or marriage, after deducting what might have been expended in their maintenance or advancement in the world. *John Snowden* had no issue, but *James* died leaving *two* sons, neither of whom attained the age of twenty-one. And the question was, whether, notwithstanding that circumstance, two-thirds of the residue *vested* in them, so as to be transmissible to their legal personal representatives. And Lord *Rosslyn* was of opinion, that the two sons took vested interests, remarking, that the present was a mere bequest of the residue of personal estate, *payable* at twenty-one, so that the rule as to vesting must take place, which was not prevented by the addition of a direction that maintenance should be deducted.(*e*)

So in *Jackson* v. *Jackson*,(*f*) a testator bequeathed to his son *R.* 400*l.* "to be *paid* to him at the end of one year next after his (the testator's) death; and the further sum of 100*l.* at the death of his (*R.'s*) mother." *R.* having died before his mother, the question was, whether he took a vested interest in the 100*l.*? And Lord *Hardwicke* determined in the affirmative, observing, that the legacy of that sum was plainly vested, and the *time of payment* only postponed; for the former words "*to be paid*," were to be carried on, as they would clearly be, if turned into any other language.

(*b*) *Ante*, Chap. II. sect. 1. p. 59. 1 Ball. & Beat. 459. 2 Atk. 122. 2 Ves. sen. 209. 1 Bro. C. C. 532, *in notis*. 2 Bro. C. C. 658. and 2 Cox, 190. 1 Dick, 344.

(*c*) In the *Civil* Code we find the rule laid down in these words: "Ex his verbis, do, lego, Ælcæ Severinæ fileæ meæ et secundæ decem, quæ legata accipere debebit, *cum* ad legitimum statum pervenerit; non conditio fidei commisso vel legato inserta; sed petito in tempus legitimæ dilata videtur." Lib. 6. tit. 53. sect. 5.

(*d*) 5 Ves. 509. See also *Stapleton* v. *Cheales*, Pre. Ch. 317. *S. P.*

(*e*) Vide 13 Ves. 113.

(*f*) 1 Ves. sen. 217

Also in *Sidney* v. *Vaughan*,(g) Mrs. *Evans* bequeathed to *Edward Vaughan* 100*l. to be paid* to him within six months after he should have fully served out his apprenticeship, to which he was then bound. *Edward*, instead of serving his time, ran away from his master, and died intestate after the period of his apprenticeship expired. The legacy was claimed by his administratrix, upon the ground that *Edward* took a vested interest in it from the death of the testatrix, as the gift and time of payment were distinct. And of this opinion was the Court of Chancery of Great Sessions for the counties of *Glamorgan*, &c. and decreed the legacy with interest, to the administratrix, from the end of six months after the expiration of the term of *Edward's* apprenticeship; a decree which was confirmed by the House of Lords.

The construction will be the same, if the payment of the legacies be *expressly* postponed until the testator's debts be discharged; for in this there is no contingency, the time is easily ascertained; and the direction is no more than what the law would have ordered without it, since legacies are only payable after the satisfaction of debts.(h)

So, if the testator declare that the legacies are not to be paid or enjoyed until the executors have realized his estate. Here, again, no inference arises that the legacies were not to vest until realization of the property, but the time of payment or enjoyment alone is referred to; which is a necessary event, capable of being reduced to certainty. A court of equity has said, it is the best *general* construction (for there may be *exceptions* as shown afterward) to consider the interests vested and in hand, though strictly, not collected for the purpose of enjoyment, as between particular interests and the capital, and the Court will *not conjecture* in favour of an intention against the general rule.(i)

Accordingly in *Gaskell* v. *Harman*,(k) Lord *Eldon* thought, in opposition to Sir *William Grant*, that the will did not afford sufficiently clear evidence of the testator's intention to postpone the vesting of the bequests until the property was collected and received.

In *Stuart* v. *Bruere* (l), the intention to postpone the vesting till a sale of the estate was doubtful, for, although there were expressions pointing to an accumulation of the rents until the sale; yet, upon the whole, it was *ambiguous* whether the intention was to postpone the enjoyment of the tenant for life of the produce to increase for the benefit of the remainder-man of the capital, of which, at *some time or other*, the former was to have the enjoyment. That time, however, was not clearly expressed. There was nothing, therefore, to controul the rule, "that what is directed to be done is to be considered as done;" so that the tenant for life was held entitled from the decree (m).

The same observations apply to the cases of *Entwistle* v. *Markland* (n), and *Sitwell* v. *Bernard* (o), where the *residue* of personal property was directed to be laid out in the purchase of real estates,

(g) 2 Bro. Parl. Ca. 254. 8vo. ed. (h) See *infra*, p. 380.
(i) 11 Ves. 498. (k) 6 Ves. 159. 11 Ves. 489.
(l) 6 Ves. 529. *in notis*, and see *Faulkener* v. *Hollingsworth*, stated 8 Ves. 558.
(m) 8 Ves. 557. (n) 6 Ves. 528. *in notis*. (o) Ibid. 522.

to be settled, &c. In neither of those cases the testator expressed in plain and direct terms what was his intention. In the latter case, a considerable difference arose from the direction for accumulation, and to invest the produce in the purchase of lands to be settled. But, upon the whole will, it was very *doubtful*, whether the words were inserted with any deliberate purpose of fixing the period at which the enjoyment was to commence, but postponing it till all the personal estate could be called in and laid out. Such a doubtful construction was therefore insufficient to controul the rule of immediate vesting; and in each case the interests were holden to have vested at the death of the testator (*p*); Lord *Eldon* observing in the latter, he would struggle for any construction rather than adopt that, which not from dilatoriness of the trustees, but only from circumstances to which probably the testator did not advert, had a tendency wholly to disappoint his intention as to the beneficial enjoyment (*q*).

Such is the rule of construction, when an immediate bequest is made to one or more persons, and the payment or enjoyment of it is postponed to a future *definite* period; the gift being distinct from the time appointed for the legatee to receive his legacy. But this rule is always subservient to the intention of testators.

2. If, therefore, upon sound construction of a will, it appear that the testator meant the time of payment to be the period at which a legacy should vest, although it be given in terms of immediate bequest, with a direction for payment to the legatee at twenty-one, or other definite period, and so far within the rule of vesting, which has been considered; yet the case will form an exception to such rule, and the legatees living to attain the age of maturity, or other period of payment is of the essence of the bequest; for, if he previously die, he will have taken no interest in the legacy to transmit to his personal representative. The following case is an illustration of the above proposition.

In *Mackell* v. *Winter* (*r*), Mrs. *Snowden* bequeathed her residuary estate to her two grand-sons, and to her grand-daughter, *Catherine Winter*, in equal proportions; the shares of grand-sons, with the interest or accumulations, after deducting maintenance and education, *to be paid* to them at their ages of twenty-one; and the share of her grand-daughter, with the interest or accumulation; *to be paid* to her at twenty-one, or marriage. The testatrix empowered her executors to apply, at their discretion, a part of the interest of the grand-sons' shares for their maintenance and preferment: and declared, that if her grand-daughter died under twenty-one, and unmarried, her residuary share, with the accumulated interest, should be equally divided beween the two grand-sons; but in case of either of their deaths, the whole should be paid to the survivor; and if either of them died under twenty-one, the survivor should take his share; and in case both grand-sons died under twenty-one, and her grand-daughter under that age, and unmarried, the whole of their respective shares, with the accumulations, were to be paid to the testatrix's nephew, *John Bandy;* and in case of his death to his children, &c. The grand-daughter attained twenty-

(*p*) See 8 Ves. 557. (*q*) 6 Ves. 541. (*r*) 3 Ves. 236. 536.

one, but the two grand-sons died under that age; and the personal representative of the survivor claimed two-thirds of the residue under the limitation to the surviving grand-son contained in the will, contending that the grand-sons took vested interests in the two-thirds, under the positive rule before mentioned; the time of payment not being annexed to the substance of the gift. And Lord *Alvanley* was of that opinion, and so decided; but Lord *Rosslyn* reversed the decree on appeal, upon the principle, that the contents of the will sufficiently indicated the testatrix's intention, that none of her grand-children should take vested interests before they became entitled to receive their respective shares of the residue. And his Lordship, upon the clearness of such intention, declared, that the grand-daughter was entitled to the *whole* residue, although the shares of the grand-sons were not expressly given to her upon their dying under twenty-one; thus raising by implication cross remainders among them.

The reasons of Lord *Rosslyn's* opinion appear to have been these: He considered the plan of the will as manifesting the testatrix's intention; first, to provide for her three grand-children, and contingently for her nephew and his children. If all or any of the grand-children lived to a period when her fortune might be serviceable to them, the whole of it, with the accumulations, was to belong to them or the survivor; but, if none of them arrived at that period, then the *whole* of the accumulations was to go to her nephew. In executing this scheme in detail, the testatrix declared, that if her two grand-sons attained twenty-one; and her grand-daughter lived to that age, or sooner married, they were to receive the whole of her property, with the accumulations, in equal shares; but if her grand-daughter died unmarried under twenty-one, her grand-sons should take that share, with the accumulations; and if either grand-son died under twenty-one, the survivor should be paid the *whole* residue, omitting to give to the grand-daughter the shares of the grand-sons in the event (which happened) of their dying under twenty-one, a mistake which was corrected by the Court upon the inference drawn from the limitation over of the fund to the nephew, who was to take nothing, except upon the death of the grand-sons under twenty-one, and of the grand-daughter dying under that age, unmarried;(*s*) a limitation which was not only sufficient by implication to entitle the grand-daughter to the shares of the grand-sons who died under twenty-one, in the nature of a cross remainder, but also to show in concurrence with the other circumstances, the testatrix's intention that no grand-child should take a vested interest in its share, until the time of payment arrived.

In *Howes* v. *Herring*,(*t*) there was a bequest to trustees of all the testator's personal estate to convert into money, and apply the interest to the maintenance of his children, the surplus to accumulate, and upon their severally attaining twenty-one, to each of them 2500*l.*; and in case of any overplus, to divide the same amongst all his said children, "or such of them as should be living *when the youngest should attain twenty-one.*" The event was, that all attained twenty-one, but one died leaving a child before the period of division, name-

(*s*) See 8 Ves. 12. (*t*) 1 M'Cl. & Yo. 295.

ly, before the youngest attained twenty-one. And it was held, that the child so dying, took no vested interest in the share of the overplus, but that it went to the surviving children of the testator.

A second exception to the rule of immediate vesting occurs, where a testator has shown a *clear* intention that no interest should vest in his legatees before his debts were satisfied. In those instances the intenton must prevail, and the bequests will be contingent until the debts *might* have been paid upon a due administration of the assets. What that period might have been, a court of equity will inquire into; for that court will not permit the rights of legatees to be prejudiced by the fraudulent or unnecessary delay of executors or trustees.

Thus in *Bernard* v. *Montague*,(*u*) the trusts of a term of 500 years, vested in trustees, were declared to be, to raise by rents and profits, or mortgage, or sale, sufficient money to pay debts in aid of the personal fund; and then to raise 2200*l.* a piece for the testator's daughters as portions, "such portions to *become due* and to be considered as *vested* in them at the expiration of two years next after the testator's death, *if* his debts should *then* be paid; but nevertheless, so as such portion should not bear interest. The next trust was, to raise maintenance out of the rents and profits, "until the portions should become payable, and *should be actually so raised as aforesaid*;" or, as expressed in another part of the will, "until they should be *actually levied* and paid as aforesaid." A further trust was declared to pay annuities to the testator's sons, "until his debts should be paid;" and then followed a declaration, that the portions of the daughters should sink into the estate, if any of them died "before the portions as aforesaid *should become due or vest*." The estate being situate in *Jamaica*, the testator directed that the slaves should remain and be employed on it "until his *debts* and the provisions for his daughters should be raised and paid, and the other trusts satisfied and fulfilled. The daughters died before the debts were paid, and the question was, whether, notwithstanding that accident, they took vested interests in the portions transmissible to their personal representatives? Sir *W. Grant* declared that the intention of the testator was sufficiently manifest from the will to postpone the vesting until his debts had been paid. And in order to ascertain the period when they might have been discharged, an inquiry was directed.

A third exception to the rule of immediate vesting may arise where a testator has plainly and *with certainty* expressed his intention that the legacies shall *not* vest until his property has been sold or realized, and got in by his executors, or be laid out in a purchase. For, if a testator think proper, whether prudently or not, to say *distinctly*, showing a manifest intention, that his legatees, general or residuary, shall not be entitled to the property unless they live to receive it; nor to the produce of his real estate until a sale, nor to lands until they be purchased, there is no law against such intention, *if clearly expressed*. But if the words admit of such meaning not being imputed to the testator, it will not be imputed

(*u*) 1 Meriv. 422. *et vide Small* v. *Wing*, 3 Bro. Parl. Ca. 503. 8vo. ed. and stated 1 Meriv. 428.

to him, as has been before noticed.(*x*) If, however, the intention be clear, it is the duty of the executors or trustees to call in the property, sell the estate, and invest the produce in a purchase for the benefit of the persons interested, and with all due diligence; since no discretion is left to them.(*y*) And whether they have done their duty, will be inquired into by the Court, as in the case last stated.

Thus in *Elwin* v. *Elwin*,(*z*) after stated,(*a*) the direction was to sell and divide the produce of real estate among five persons, "at such time as the sale should be completed, in case they were then living:" and Sir *W. Grant*, M. R. was of opinion, that the interests were contingent until a sale, without the fault of the trustees, was or might have been made; and in order to ascertain that fact, he directed an inquiry.

A fourth exception must be made out of the positive rule applicable to the vesting of legacies, where the gift of the legacy and the time of payment are in terms distinct, when the period for payment is *contingent*, *as upon the marriage*, or *the taking of holy orders* of the legatee; for in neither of those instances, will the legacy vest before the happening of the contingency, as we have seen it would have done, had the time of payment been *certain*. The distinction is founded upon the following reasoning. It must be inferred, that where the time is certain, as when the legatee attains the age of twenty-one, the testator merely postponed the payment of the legacy in consideration of the legatee's unfitness to manage his affairs prior to that period; but when the event annexed to the payment, may or may not happen, it is to be presumed, that the expectation of its taking place, was the sole *motive*, and therefore of the *essence* of the bequest.(*b*)

Accordingly, in *Atkins* v. *Hiccocks*,(*c*) the bequest was of 200*l.* to *Eliz. Hiccocks*, *to be paid* at the time of her marriage, or within three months afterwards, provided she married with the approbation of, &c. The testator also gave to *Elizabeth* an annuity, until that event took place; but she died without ever having been married, after having attained the age of twenty-one. The question was, whether *Elizabeth* took such a vested interest in the legacy, as was transmissible to her administrator? And Lord *Hardwicke* determined in the negative; upon which occasion he remarked, that in the common cases of legacies to be paid at the age of twenty-one, there was a *certain* time fixed, not to the thing itself, but to the execution of it; and the time so fixed must necessarily arrive. But that when the time annexed to the payment was merely *eventual*, and might or might not come, and the person died before the contingency happened, his Lordship could find no instance in the court, where it had been decided that the legacy should be paid at all events.

It may be concluded from these observations, that when the event, upon which a legacy is directed to be paid, is uncertain as to its ever taking place, the legacy will not vest previously to the

(*x*) *Ante*, p. 378. and see 11 Ves. 497. (*y*) 11 Ves. 498. (*z*) 8 Ves. 547.
(*a*) *Infra*, sect. 5. (*b*) Godolph, Orph. Leg. 452. Swinb. pt. 4. sect. 17. p. 267.
(*c*) 1 Atk. 500.

happening of that event; and that it is immaterial in this respect, whether the gift and the time of payment be in form distinct, as in the last case, or whether there be no gift, except in the direction for payment of the legacy, as in the cases below referred to;(*d*) since, in each instance, the taking place of the event, is a condition precedent to the vesting of the legacy, according to the maxim that *dies incertus in testamento conditionem facit.*

It seems, however, that this maxim is not without exception, for it must yield to the intention of testators. That intention was considered by Lord *Alvanley* in the following case, to be sufficiently apparent, attending to the subject of bequest, which was a *residue*, the ages of the legatees, and the manner of the gift.(*e*)

The case refered to, is *Booth* v. *Booth*,(*f*) in which Mr. *Bragge*, having two great-nieces, both of age, named *Phœbe* and *Ann Booth*, devised the residue of his estate to trustees, in trust, to place it out at interest, and pay the annual produce to *Phœbe* and *Ann Booth*, until their marriages, and immediately after their respective marriages, to assign to them respectively *their several shares*. *Phœbe*, after surviving the testator, died without ever being married, and the question was, whether, notwithstanding *Phœbe* never married, she took a vested interest in her moiety, which was transmissible at her death to her personal representatives, one of whom was her sister *Ann*, and *unmarried*, and also her *residuary* legatee? Lord *Alvanley*, after great consideration, and a full review of the authorities upon the present subject, determined, that, as this was a *residue*, and the marriages required were annexed to the times of payment, and not to the gifts of the legacies, *Phœbe* took a vested interest in her share, to which *Ann*, as her residuary legatee, was *immediately* entitled, although *Ann* could not claim her own *original* share previously to marriage; his Lordship observing, that the Court had never accelerated the payment, and that an interest might be vested and disposable, but not tangible, in the meantime, a provision which might be wisely intended for the benefit of the legatee.

In the last case, it was contended that marriage was not merely annexed to the *payment* of the shares, but also to the *gifts* of them, so as to make the marriages of the grand-nieces an indispensable preliminary to the vesting an interest of their proportions. But Lord *Alvanley* considered the terms of the devise, as equivalent to the testator declaring a trust of the residue for the grand-nieces, with a direction to pay to them the interest until they married, and then to assign the principal; that it was not merely a gift of the interest till marriage, stopping there, and *after* marriage, a gift of the capital, for it was clear that the testator considered the principal to have been immediately given, and therefore spoke of it as "the shares" of the legatees of the residue, the *possession* of which they were to receive when they severally married; thus distinguishing between the *gift* of the residue, and the *time* and *event* when the

(*d*) *Garbut* v. *Hilton*, 1 Atk. 381. *Elton* v. *Elton*, 3 Atk. 504. *Hemmings* v. *Munckley*, 1 Bro. C. C. 304. *Knight* v. *Cameron*, 14 Ves. 389. *Malcolm* v. *O'Callaghan*, 2 Mad. 349.

(*e*) See *Bird* v. *Hunsdon*, 2 Swanst. 342. also *Jones* v. *Mackilwain*, 1 Russ. C. C. 220.

(*f*) 4 Ves. 399.

possession of it was to be delivered. Lord *Alvanley*, in the above manner having attempted to prove that the marriages of the legatees were conditions *subsequent*, not precedent, to the vesting of the property, and in addition, after remarking how improbable it was that the testator should not have disposed of the residue in the event of his grand-nieces not marrying, if he had not intended to bequeath to them the absolute interest in it, proceeded to show that the authorities *Garbut* v. *Hilton*, *Atkins* v. *Hiccocks*, and *Elton* v. *Elton* (before referred to) were inapplicable to the present case, since none of them were dispositions of *residue*, and the marriages in those instances were required to be had *with consent*. It was under those circumstances, and on the ground of the bequest being of a *residue*, to persons of maturity, a circumstance relied upon by him, as also upon the *words* of the devise, that his Lordship declared the present to be a case to which the maxim *dies incertus in testamento conditionem facit* could not be applied.

The last case must not be considered as an authority, that in general a *residuary* bequest will vest before the event happens upon which it is given. It proves quite the contrary. The whole tenor of Lord *Alvanley's* argument shows that the gift of a residue upon a contingency, or where there is no gift, but by a direction to transfer it *from* and *after* or *at* a given event, the vesting will be deferred till the event has happened, unless from particular circumstances (as in the last case) a contrary intention can be collected from the will. And in conformity with this distinction, Sir *W. Grant* determined in *Leake* v. *Robinson*,(*g*) that a *residuary* disposition of real and personal estate, upon trust to assign and transfer to such children as shall attain the age of twenty-five, with benefit of survivorship among them, did not vest before the legatees attained that age.

SECT. III. When there is no express gift of the legacy previously to the time appointed for its payment.(*h*) And,—

FIRST.—When the legacy is contingent from the effect of *conditional words*.

In the beginning of this chapter it was noticed that legacies given to persons *payable* or *to be paid* at or when they attained twenty-one, vested the interests in the funds in the legatees, which entitled their personal representatives to the property, although they (the legatees) died before arriving at those ages, upon the principal that the gift of the legacies was distinct from the periods appointed for their payment. And it is to be observed, that the words *paid* and *payable* are considered so material, that, if they be omitted, and the bequests made to the legatees, *as*, *if*, *provided*, *in case of*, or *when* they attain twenty-one, those expressions will, without being controlled by the context of the will, constitute the times of payment as of the essence of the bequests; and consequently, the legatees can take no vested interests until they attain twenty-one. We shall, therefore, proceed to give instances where those words were held to postpone the vesting until the legacies became payable, beginning with the word "*at*."

In *Smell* v. *Dee*,(*i*) the bequest was of 100*l.* a-piece to the two

(*g*) 2 Meriv. 363. 384.
(*h*) See *Batsford* v. *Kebbel*, 3 Ves. 363. and *Sansbury* v. *Read*, 12 Ves. 75.
(*i*) 2 Salk. 415.

children of *J. S.* "*at* the end of ten years next after the testator's death." The legatees died before the expiration of the ten years. Lord *Cowper* held the legacies to be extinct, and said, "that wherever the time is annexed to the legacy, and not to the payment of it (as in the present case,) if the legatee die before the day of payment, the legacy is lapsed."

So in *Onslow* v. *South*,(*k*) the testator being possessed of considerable personal estate in *Jamaica* and in *England*, bequeathed as follows: "I give to *J. S. now* under the custody of *R. D.* 2000*l. at* the age of twenty-one years, *to be paid* by my executors in *England*." *J. S.* died under twenty-one, but, having attained the age of eighteen, he bequeathed this legacy to the defendant *South;* the validity of which disposition depended upon the question, whether *J. S.* took a vested interest in the money before the age of twenty-one. And the Lord *Chancellor* determined that the legacy did not pass to the defendant, since *J. S.'s* interest in it was not vested, but contingent; and his Lordship remarked, that the word "*now*" was merely descriptive of the condition of the legatee, and that the word "paid" was only applicable to the persons by whom the money was to be satisfied.

Also in *Cruse* v. *Barley*,(*l*) where the testator gave to his eldest son *Christopher Banson*, 200*l. at* his age of twenty-one. *Christopher* died under twenty-one, and it was determined that the legacy never vested in him; as the age was annexed to the *gift*, and not to the *payment*, and consequently, his personal representative could not be entitled to the money.

Since a bequest to *A. at* twenty-one will not, as has been shown, vest in him before he attains that age, as the gift and the payment of the legacy are indivisible; so neither will a legacy given to *A.* "if" he attain twenty-one, vest at an earlier period. For until the event happens, that which is grounded upon it cannot take place. The word is strictly conditional; and according to the civil law (which supplies the ecclesiastical courts and courts of equity with most of their rules in the construction of legacies,) a bequest so expressed would not vest the interest in the legatee prior to the age of twenty-one.(*m*)

The word *provided* is also a conditional term; so that, if a bequest were made to *B.* "provided" he attain twenty-one, the legacy will not vest in him before he arrives at that age.

Thus in *Atkinson* v *Turner*,(*n*) the testator gave two-thirds of three-eighths of his joint stock and trade to his grandson, *Richard Turner*, *provided* he should attain the full age of twenty-one, with remainder over if he did not live to that period. *Richard* died under twenty-one; and the question was, whether his administrator was entitled to the profits which accrued from the death of the testator to that of his own; which depended upon the circumstance whether he took a vested interest in the legacy during minority. And the *Master of the Rolls* determined in the negative; considering, that

(*k*) 1 Eq. Ca. Abr. 295. pl. 6. (*l*) 3 P Will. 20.

(*m*) Dig. Lib. 36. tit. 2 sec. 22. and see *Brownsword* v. *Edwards*, 2 Ves. sen. 243. 248. *Denn* v. *Bagshaw*, 6 Term. Rep. 512. 1 New Rep. C. P. 325. Co. Litt. 204. 3 Ves. 735.

(*n*) 2 Atk. 41 and see *Garbut* v. *Hilton*, 1 Atk. 381. and 14 Ves. 392.

by the words of the will nothing vested in the legatee, since he did not attain the age of twenty-one.

The last case is peculiar in this respect, that it was the bequest of a partnership and the profits of a trade. But the Court said, that was of no consequence, for the more general the rule was made, so much the better; it being very dangerous to run into niceties, to distinguish from it any particular case, as that must necessarily occasion uncertainty and confusion.

Similarly to the expressions before considered, the words "*in case*" import contingency. Suppose then a legacy be given to *A. in case* he marry with consent, or *in case* he attained twenty-one; or to be *paid* to him *in case* he live to that age, and not otherwise. *A.'s* marriage with consent, or his arrival at twenty-one, must precede his taking a vested interest in the bequest.

Accordingly in the case of *Elton* v. *Elton*,(*o*) where the testator gave to his grand-daughter, *Anna Elton*, 1500*l.* to be at her disposal, *in case* she married with consent, &c. Lord *Hardwicke* held, that marriage was a condition precedent to the vesting of the legacy; observing, that whether a testator said, "in case she marry, I give, or, I give in case she marry" made no difference; for in both instances, marriage is annexed to the substance of the devise.

And in *Knight* v. *Cameron*,(*p*) the bequest was of 1000*l.* to *Frances Douglas*, to be paid to her as soon as she attained twenty-one; and *in case* she should live to attain that age, and not otherwise. Sir *W. Grant* observed, it was impossible to say that this was not a condition precedent either to the payment or the vesting.

Much diversity of opinion has existed upon the proper construction of the word "*when.*" Some persons have considered the expression as denoting a precedent condition, annexing the time or action to the substance of the gift; while others have interpreted the word as solely indicative of the testator's intention to mark the period, at which his legatee should have the possession and full benefit of the bequest, and not to make the living of the legatee at the time, essential to the legacy taking effect, Lord *Alvanley* in *May* v. *Wood*,(*q*) was of the latter opinion; and determined that a bequest to *A.* and *B.* to be equally divided between them *when* they should attain twenty-one vested in them at the death of the testator. His Lordship made the decision without regard to the effect of the words "equally to be divided," which being synonimous with the words "to be paid," appear sufficient, according to the rule stated in the first section, to have imparted vested interests to the legatees at the death of the testator. However, the case of *May* v. *Wood*, may be considered a determination, that if a legacy be given to *A. when* he attains twenty-one, the interest will vest in him, and be transmissible to his personal representative at his death under that age.

The above decision of Lord *Alvanley* was carefully and maturely considered by Sir *William Grant* in *Hanson* v. *Graham*.(*r*) And although that case did not require his Honour to determine it against the principle upon which Lord *Alvanley* professed to decide the case of *May* v. *Wood*, yet so well satisfied was he that such principle was erroneous, as to induce him to declare, that had there been

(*o*) 3 Atk. 504. (*p*) 14 Ves. 389. (*q*) 3 Bro. C. C. 471 (*r*) 6 Ves. 239.

no other circumstances in the case then under his consideration, but his opinion had been requested in regard to the vesting or not vesting of the legacies which were given "to *B.*, *C.* and *D. when* they respectively attained their ages of twenty-one or days of marriage," he would have decided that they did not vest in the legatees before the happening of one of those events. His Honour, upon the proposition, stated in the report of *May* v. *Wood* to have been laid down by Lord *Alvanley*, viz. "that all the cases for half a century upon *pecuniary* legacies had determined the word *when* not as denoting a condition precedent, but as only marking the period when the party should have the full benefit of the gift, except something appeared upon the face of the will to show that his bounty should not take place, unless the time actually arrived,"(*s*) observed, that *no* case had determined the word *when*, as referred to a period of life, standing by itself, and unqualified by any words or circumstances, to denote merely the *time* at which it was to take effect in *possession*, but to be a word of condition, denoting the *time* when the *gift* was to take effect in *substance*.

His Honour's observations must be confined to testamentary dispositions of *personal* property, which are regulated by the rules of the civil law: for it seems to be settled, that if freehold estate be devised to *A. when* he shall attain twenty-one, *A.* will take an immediate vested interest in the subject, whether the devise be immediate or in remainder.(*t*)

By the civil law, the words "when" and "if" are of the same import in speaking of an uncertain event. Both are words of condition annexed to the very gift of the legacy, when unexplained by the context of the will.(*u*) The construction is the same in courts of equity, which adopt the rules of the civil code upon the present subject.

Accordingly, in *Stapleton* v. *Cheales*(*x*), it was stated by counsel, and agreed to by the Court, that if a legacy be given to a person *when* he shall attain the age of twenty-one years, and the legatee die during minority, the bequest is lapsed, and shall not go to his executors or administrators; a proposition, which Sir *William Grant* declared, in *Hanson* v. *Graham*, that he did not find contradicted by any authority.

Agreeably therefore with the civil law, and with our own founded upon it in personal bequests, as admitted in the case of *Stapleton* v. *Cheales*, it may be reasonably concluded that a bequest to a person *when* he shall attain twenty-one, is contingent during his infancy, so as not to entitle his personal representative to receive it if he die before twenty-one (*y*).

But all these and other similar words of condition may be so explained and controlled by the context of the will, as not to prevent the legacies from vesting before the happening of the events, upon which they are made payable. In such instances, the intention of testators will predominate over technical words and expres-

(*s*) 3 Bro. C. C. 474.
(*t*) *Doe* v. *Moore*, 14 East, 601. and see 1 Maul. & Selw. 334. and *Machin* v. *Reynolds*, 3 Brod. & Bing. 121.
(*u*) Dig. Lib. 36. tit. 2, sect. 22.
(*x*) Pre Ch. 317. and see Grant's case, stated 10 Rep. 50 *a*, and Cro. Car. 435.
(*y*) 9 Ves. 230. 1 Burr. 227.

sions, when it is declared, or appears from a sound rational construction of their wills. It may, therefore, be useful to consider some of the cases, when such words and expressions wer edeprived of their natural import, and which will be attempted under the following title :

SECOND. When legacies will vest at the testator's death, notwithstanding they be given in *words purporting* to constitute the *gifts* and *times of payment* of them, one and the same.

In the construction of wills the intention of testators is the great object to be ascertained, and, when discovered, it will always prevail, if agreeable to the rules of law. Hence, although the terms of bequeathing a legacy be such, as, if unexplained by other parts of the will, would prevent it from immediately vesting ; yet, if they be coupled with circumstances showing that a condition precedent to its vesting was not intended, but that the words importing a condition were only meant to denote the period when the legacy was to be received or enjoyed, the sense is put upon the words which the will requires (*z*). Consequently the words *if*, *when*, &c. may or may not be conditional according to circumstances. Instances of their conditional import have been given, and examples of their not being so considered now remain to be produced. There are some general *rules* which may be guides in these cases, one of which is,—

1. When the period of payment or enjoyment of the fund is deferred until the legatee attain twenty-one, and the first gift of it is made to him *when* or *after* he shall attain that age, but in the *meantime* the property is given to a parent, guardian or trustee, for the legatee's benefit; the words "when" or "after," which import a condition precedent to the vesting of the legacy, will not be permitted to produce that effect; on the contrary, they will be considered as merely descriptive of the *time* when the legatee was to be let into the *possession* of the fund, and then according to the rule mentioned in the first section, the interest in the legacy will vest at the death of the testator; and, if the legatee die before twenty-one, his personal representative will be entitled to the money. The principle is this ; since the *whole* interest in the fund is given in one way or the other to and for the benefit of the legatee, it could not be the testator's intention to make it contingent whether the legatee should have the absolute interest. That interest is split into two parts ; till one period it is given to the parent, guardian, or trustee ; and at the other it is given to the legatee. The reason why it was not given sooner to the legatee, was from regard to his convenience, as it could not be conveniently given to a person under age. Hence it is apparent that the conditional words were merely annexed to the *payment*, not to the *gift* of the legacy(*a*). The following authorities are produced in support of these remarks, commencing with those cases *where* the *interest* of the legacies was given for the *maintenance* of the legatees until the money became payable.

It is settled that, although there be no gift of a legacy previous to the period appointed for its payment, yet, if the *intermediate in-*

(*z*) See Chap. XIII. sect. 1. (*a*) 9 Ves. 230.

terest be given to the legatee, or be directed to be applied for his *maintenance* or *education*, such circumstances will *primâ facie* have the effect to vest the legacy; and for this reason; as no interest could accrue to the legatee before the time appointed for payment of the *principal*, the testator's intention in giving such interest must be presumed to have been, to give the capital in all events to the legatee, and to have allowed him intermediate interest as a recompence for the forbearance of the capital(*b*).

Thus in *Fonereau* v. *Fonereau*,(*c*) the bequest was of 1000*l.* to *Claudius Fonereau*, *when* he should have attained the age of twenty-five. The testator empowered his executors and trustees to place the money at interest, which he directed to be applied at their discretion for the education of *Claudius*, as also part of the principal to put him apprentice, and the remainder to be paid to him *when* he should have attained the age of twenty-five, and *not before*. *Claudius* having died under that age, the question was, whether his personal representative was entitled to the legacy? which depended upon this; whether he took a vested interest. And Lord *Hardwicke* decided in the affirmative.

Had the disposition in the last case stopped at the conclusion of the first sentence, doubtless, Lord *Hardwicke* would have determined against the vesting of the legacy. His Lordship, however, rested his decision upon the subsequent words controlling the word *when*, as it would have operated standing alone. For when the testator proceeded to give interest for the education of the legatee, and a power to the trustees to apply any part of the principal as an apprentice fee with the legatee, and gave the remainder of the capital to him when he should attain the age of twenty-five, it was clear upon the whole will, that nothing was, or was intended to be, postponed by the conditional term *when*, except the payment of the money(*d*).

So in *Hoath* v. *Hoath*(*e*), the testator gave 100*l.* to *Thomas Hoath at* his age of twenty-one, and directed the intermediate *interest* to be paid to his mother for his maintenance. *Thomas* having died under twenty-one, the question was, whether this was a vested legacy? And Lord *Thurlow* determined in the affirmative, in consequence of interest having been given for the benefit of *Thomas*, before his legacy became payable.

This principle was acknowledged by Lord *Kenyon*, M. R. in *Walcott* v. *Hall*(*f*). In that case, *John Pearce*, bequeathed to his god-son, the plaintiff, *Thomas Walcott*, 50*l.* to be paid at twenty-one or marriage, and directed the money to be placed at interest in the name of his executor, who was to apply such interest towards the maintenance and education of *Thomas;* but if *Thomas* died before twenty-one or marriage, the testator gave the legacy to his own executor, in trust for the poor of *Stoke;* and after disposing of his residuary estate, he appointed the defendant *Hall* executor, who having distributed the residue and retained the legacy of 50*l.* became a bankrupt, and obtained his certificate. *Thomas Walcott*,

(*b*) 2 Ventr. 342. *Stapleton* v. *Cheales*, Pre. Ch. 318. *Saunders* v. *Earle*, 2 Chan Rep. 190. (*c*) 3 Atk. 645. (*d*) 6 Ves. 245. (*e*) 2 Bro. C. C. 4. (*f*) Ibid. 305. and see 2 Meriv. 386.

the legatee, attained the age of twenty-one ; and it was one of the questions, whether he had a claim upon the executor for the 50*l.* ? which depended upon this, whether *Thomas* took a vested interest before twenty-one, that might have been proved under the commission ; for if he had, then his right was barred by the certificate. And the *Master of the Rolls* was of opinion, that the legacy vested in *Thomas* previously to his attaining twenty-one, which might have been proved under the commission, and was therefore barred by the certificate. And his Lordship remarked, that the gift of *interest* always vested personal legacies.

In conformity with these authorities, Sir *W. Grant* decided the case of *Lane* v. *Goudge*(*g*), in which the testatrix being possessed of 2025*l* three *per cent.* consols, bequeathed to her sister *Naomi Ivy*, 30*l.* yearly for life, to be paid out of the three *per cent.* consols, and she gave all the *interest* that remained, after payment of the 30*l.* to *James Lane, for* his second daughter to be born, (she being christened *Zipporah Ivy*) for her education, *until* she arrived at twenty-one ; and after she attained that age the testatrix bequeathed to her such interest absolutely. The testatrix also gave the annuity of 30*l.* after the death of *Naomi Ivy*, to *James Lane*, until his same second daughter attained twenty-one, and after she arrived at that age, the testatrix bequeathed to her the annuity for ever. *James* had a second daughter, whom he christened *Zipporah Ivy*, and she died intestate, under the age of twenty-one. Her father nevertheless claimed a transfer of the bank annuities, on the ground that his daugeter took a vested interest in them, to which he was entitled as her legal personal representative, and so Sir *W. Grant* determined.

With respect to the first bequest, there could be little doubt of *Zipporah* having taken a vested interest in it, since the dividends to accrue during her minority were given to her father as a *trustee* for her, and *for her education*, which showed that the legacy was meant to pass to her *instanter*, with a postponement of the possession until she attained the age of twenty-one. And in regard to the second bequest, although it was not expressed to be given to her father for her, or for her education, as in the first, an omission founded probably in accident ; yet supposing that omission incapable of being supplied, and the father therefore entitled to the annual dividends from the death of *Naomi* during his daughter *Zipporah's* minority ; still as *Zipporah* would take a vested interest in remainder in those dividends, to commence in possession, from her age of twenty-one, her father, in his own right, and as her personal representative, became absolutely entitled to the whole of the bank annuities at her death (*Naomi* being then dead,) and consequently to a transfer of them for his own use and benefit.

It is to be remarked, that where the interest of the fund is so given as to vest the legacy before the time of payment, that construction will not be prevented by the insertion of dubious expressions.

Thus in *Dodson* v. *Hay*,(*h*) Mr. *Wilmot* bequeathed to the children of his sister the whole of his real and personal estates, directing that *all* the children should be educated with the yearly *interest* of

(*g*) 9 Ves. 225. (*h*) 3 Bro.C. C. 404. 409. Ed. by Belt.

whatever portion of his estate might fall to each respective child's lot or share; and that such portion should not be otherwise claimed or inherited, directly or indirectly, *until* the said children arrived at the age of twenty-two years, whether married or single. One of the children, a daughter, died before attaining that age, and her share was claimed by her administrator, upon the ground that she took a vested interest in it at the death of the testator, and the Court determined in favour of the claim; the *Master of the Rolls* observing, that by the gift of interest, the shares being *primâ facie* vested, that interpretation could not be altered by words of vague import; and that the enjoyment, not the gift, of the fund was postponed until the legatees attained their ages of twenty-two years.

Such is the established rule in favour of vesting, founded upon the intention of testators, presumed from the gift of intermediate interest for the support of the legatees previous to the arrival of the times appointed for receipt of the capital. But if the gift of maintenance be not co-extensive with the whole amount of the interest; or if it be made out of another fund, in neither case will the legacies vest prior to the arrival of the periods at which they are made payable; for such provisions afford no presumption that the testators intended the legacies to vest before they became due;(*i*) and then the gifts and the payments of the legacies being one and the same, if the legatees die before that period, their personal representatives cannot make a title to the funds.

We shall next proceed to the authorities which prove, that where the interest of legacies before their times of payment is not expressed to be applicable for the support of the legatees, but it, or the funds, are given to parents, guardians, or trustees for the benefit of the legatees generally, such bequests will vest in them at the death of the testators, notwithstanding the gifts and times of payment of the legacies are the same, and which, without such a declaration, would have made the bequests contingent previously to the arrival of the periods when they were appointed to be paid.

Thus in *Hanson* v. *Graham*,(*k*) the testator bequeathed to his three grandchildren 500*l.* a piece four *per cent.* consols, *when* they should respectively attain the ages of twenty-one, or be married, provided the marriages were had with the consent of his executors and trustees; and he directed the *interest* of the annuities to be laid out at the discretion of his executors and trustees as they should think proper, *for the benefit* of the legatees *until* they attained twenty-one or marriage, and for no other use, intent, or purpose. The testator then gave his residuary personal estate to his son *Isaac Graham*, whom he appointed executor. One of the grandchildren died intestate at the age of nine years, after surviving the testator, and the question was, whether the plaintiffs, its next of kin, or the residuary legatee of the testator, were entitled to the legacy; which depended upon this circumstance, whether the deceased grandchild took a vested interest in it? And Sir *W. Grant* determined in favour of the plaintiffs, the next of kin, upon the principle, that the gift of the whole interest for the benefit of the legatees, which gave them the absolute property in it, as it became due, also gave them immediate

(*i*) See 3 Bro. C. C. 416. 6 Ves. 249. 2 Meriv. 386. (*k*) 6 Ves. 239. 249.

vested interests in the legacies; and consequently, that the next of kin of the deceased grandchild were entitled to the 500*l.* bequeathed to it.

In *Branstrom* v. *Wilkinson*,(*l*) the testator gave to the two children of his niece, one dock-share, &c. *when* they should attain the ages of twenty-one, in equal shares, and appointed their father *trustee for them* during minority. The question was, whether the legatees took vested interests before twenty-one? And Sir *W. Grant* decided in the affirmative, upon the ground that the testator in appointing a trustee for them during minority, clearly showed his intention to postpone the possession, and not the vesting of the legacies.

Upon similar reasoning, the case of *Love* v. *L'Estrange* may be supported, notwithstanding Lord *Rosslyn* expressed his inability to account for the principle of the decision,(*m*) unless it were to be referred to the circumstance of being a *residue;* as the words were annexed to the gift.

In that case,(*n*) the testator vested in trustees, who were his executors, his residuary estate, in trust to sell, dispose of, and *improve* "until *Walter Nash* should attain his age of twenty-four years." He then expressed a wish, that *Walter* should be wholly employed in his trade, either as an apprentice or a journeymen, *until* his said age, and directed that he should be paid an annuity of 10*l.* out of the residue from his age of twenty-one until he attained twenty-four, and *from thenceforth* in trust (as to the residue) for him the said *Walter Nash*. *Walter* died under the age of twenty-four; and the question was, whether he took a vested interest in the fund which was transmissible to his personal representatives? Lord *King* determined in the affirmative, from whose decree the testator's next of kin appealed to the House of Lords, which confirmed the decision.

Although the last was a case not of simple unqualified gift to the legatee, yet there were many circumstances to show that *Walter Nash* was intended to have the benefit absolutely; and that the *enjoyment* of the property was alone postponed until he attained the age of twenty-four. The reason for deferring payment is obvious. *Walter Nash* was a minor at the date of the will, and the testator appeared to be anxious to counteract the mischief with which possession of his fortune might be attended to the legatee, if he were permitted to receive it at an earlier period than the age of twenty-four; as it might induce him to abandon the trade which the testator was desirous he should qualify himself for, and carry on. That was the motive for postponing the enjoyment of the bequest; and in addition, the testator, in the mean time, gave the fund, intended for *Walter*, to *trustees*, *for his benefit*, to *improve for him* and to make him an allowance in the interim; circumstances, proving under the authority of the cases before stated, that the fund was intended to be immediately given to the legatee, with a delay of the possession only until he attained the age of twenty-four years.

In all the instances which have been produced, the *corpus* of the property was *immediately* given, and the interest or fund directed

(*l*) 7 Ves. 421.
(*m*) 1 Bro. C. C. 300.
(*n*) Bro. Parl. Ca. 59. 8vo. ed. and see *Doe* v. *Lea*, 3 Term. Rep. 41. and *Goodtitle* v. *Whitby*, 1 Burr. 228.

to be applied or managed for the *benefit* of the legatee. If, however, the interest or dividends alone be the subject of bequest *until* a particular time, and the principal is not sooner taken out of the residue, but directed for the first time to be taken out of it, and paid or transferred to the legatee at the *end of that period*, the *intermediate* gift of the interest or dividends will not vest the capital; because the gift and payment of it are one and the same, and it was the intention of the testator to make the gifts of the interest and the capital separate and distinct, so as to constitute the time appointed for payment of the principal, the very essence of the gift of it.

Batsford v. *Kebbell*,(*o*) is a case of this description. There the testatrix gave to *Robert Endly* the *dividends* which should become due after her death upon 500*l.* three *per cent.* bank annuities *until* he should arrive at the full age of thirty-two years, *at which time* she directed her executors to transfer to him the *principal* sum, for his own use. *Robert* died under that age; and the question was, whether his personal representatives or the residuary legatee of the testatrix were entitled to the legacy? which depended upon the circumstance, whether *Robert* took a vested interest in it previous to the age of thirty-two. It was insisted for the residuary legatee, that there was no gift of the principal to *Robert* but in the direction to transfer *at a time* which never arrived; and that the difference was between a gift of the *corpus*, taking it out of the residue, and a gift of the *dividends* only, the capital being to be taken out at a future period. And Lord *Rosslyn* concurred in this statement, and decreed in favour of the residuary legatee; remarking, that he had looked into the cases, from which it appeared that *dividends* were always a distinct subject of legacy; that, in this instance, there was no gift but in the direction for payment; a direction that only attached upon a person of the age of thirty-two, which necessarily excluded *Robert*, as he never attained that age. And his Lordship said, that in all other cases of vesting, *the thing* was given, and the *profit* out of it was given.

2. It may, however, happen that the intermediate interest is not bequeathed to or for the maintenance or benefit of the legatee during minority, or until the fund is directed to be paid to him; but such interest may be bequeathed to another person *beneficially* till the legatee of the capital arrive at a particular age, and, when he attains to it, the fund may be directed to be transferred to him, or the fund or its intermediate interest may be given to executors or trustees to answer particular purposes, as to pay debts, &c. with a direction to pay over the property to the legatee *after* satisfaction of those demands; or the intermediate interest may be given to another person for *life*, as when the fund is bequeathed to or in trust for *A.* for life, and after his death to *B.* In all those cases, the person to whom the absolute property is limited, will take an immediate vested interest in the subject, since such bequests are in the nature of *remainders;* the rule as to which is, that the interests of the first and subsequent takers vest together. It is clear that the testator intended to give immediately the capital to the person in

(*o*) 3 Ves. 363. referred to 3 Ves. 367. 5 Ves. 514. 3 Meriv. 342. and see *Sansbury* v. *Read*, 12 Ves. 75. See also *Ford* v. *Rawlins*, 1 Sim. & Stu. 328.

remainder, with a postponement of the enjoyment only until he arrived at a particular age, or until the particular purposes were answered, or so long as the tenant for life continued to live. Upon these subjects, it is indifferent whether the devise be of real or personal estate; provided, when the subject is personal estate, the *whole* property in it be given with a particular interest out of it; for it will be afterwards shown that if the interest of personalty be alone given to a person for life, and the context of the will show that the *capital* was not intended to be disposed of till after his death, the interest in the capital will be contingent during the life of such person; because there is no gift of the principal previously to the direction for its payment, and the gift and time of payment are one and the same. We shall proceed to consider,(*p*)—

FIRST, instances of legatees in remainder taking vested interests in the capital at the testator's death, although the interest of the fund accruing between that period and the arrival of the legatees at particular ages, when the capital is given to them, is bequeathed to another person beneficially.

In *Lane* v. *Goudge*,(*q*) before stated,(*r*) we have seen that the annuity of 30*l*. bequeathed to *Naomi Ivy* for life, remainder to *James Lane*, until his second daughter attained twenty-one, and then to her absolutely, vested in the daughter at the death of the testator.

So in *Taylor* v. *Biddall*,(*s*) the devise was to *Elizabeth Smith* for so long time and *until* her son *Benjamin* attained his full age of twenty-one; and *after* he should have arrived at that age, then to him absolutely. The Court held that *Elizabeth* had a term for years in the estate until *Benjamin* was twenty-one, and that *Benjamin* took a vested remainder in fee.

And in *Manfield* v. *Dugard*,(*t*) the testator devised lands to his wife *till* his son attained twenty-one; and *when* his son arrived at that age, then to him in fee. The son died under twenty-one. And the Lord *Chancellor* decided that the son took a vested remainder in fee, expectant upon the term for years in his mother, a term which expired at his death.

SECOND. Where the property will vest in the legatee in remainder at the testator's death, so as to be transmissible to his personal representative, although the interest of the fund, or the fund itself, be given to executors or trustees to answer particular purposes, as to pay debts, &c. and the capital is not bequeathed to the legatee until *after* satisfaction of those demands.

In *Boraston's* case,(*u*) the devise was to a man and his wife for eight years, and after that term the lands were to remain to the executors of the devisor, until such time as *Hugh Boraston* should accomplish his full age of twenty-one; the mesne profits to be employed by the executors towards the performance of the testator's will; and *when* the legatee should attain twenty-one, *then* that he should enjoy the estate to him and his heirs. *Hugh Boraston* died under twenty-one, and the Court of *King's Bench* determined, that the remainder vested in him at the death of the devisor, with a post-

(*p*) See the last case. (*q*) 9 Ves. 226. 231. (*r*) *Ante*, p. 389. (*s*) 2 Mod. 289.
(*t*) 1 Eq. Ca. Abr. 195. pl. 4. (*u*) 3 Rep. 19. 21. 1 New Rep. C. P. 317.

ponement of the possession until *Hugh* completed the age of twenty-one.

Third. Where a legacy in remainder after an interest for *life* will vest at the testator's death, so as to be transmissible to the personal representative of the legatee, although he die before the tenant for life.

When the absolute property in a fund is bequeathed in fractional interests in succession, at periods which must arrive: as to, or in trust for *A.* for life, and after his death to *B.*; the interests of the first and subsequent takers will vest together, and notwithstanding *B.* may die before *A.*, his personal representatives will be entitled to receive the legacy upon the death of *A.*(*x*) This doctrine is established by a variety of cases.

In *Monkhouse* v. *Holme*,(*y*) the testator gave 800*l.* to trustees to pay to his wife the interest for life, and *from and after her death* he disposed of the *said sum* of 800*l.* in manner following, &c. Then the testator, after several intermediate devises and bequests, gave the legacy, upon which the question arose: "I also give to *Jonathan Monkhouse*, son of my brother *George*, the sum of 100*l.*" *Jonathan*, having survived the testator, died before the widow; and the question was, whether he took a vested interest in the legacy, so as to transmit it to his personal representatives? And Lord *Rosslyn* decided in the affirmative; his Lordship remarking that the 800*l.* was *given* to the trustees to pay the interest to the wife for life, and then in parts and shares, which showed that the testator intended to give vested interests to the several legatees.

So in the *Attorney General* v. *Crispin*,(*z*) the testatrix, after giving several annuities, bequeathed *after* the death of the annuitants, 50*l.* to each of the children of *D. Riviere*. *D. Riviere* then had seven children, six of whom died before the surviving annuitant; and one of the questions was, whether any interest vested in the *six* children, as they did not survive the last annuitant? And the Lord *Chancellor* determined that they took vested interests.

The last case was followed by *Benyon* v. *Maddison*,(*a*) in which Mr. *Lynde* bequeathed the whole of his estate to the defendant, to pay the *interest* to his mother, *Hester Lynde* for life; and *after* her death, he *then* gave to five persons 500*l.* each, three *per cent.* annuities, and to *J. Benyon* and *Mary* his sister, 100*l.* each like annuities. *J. Benyon* survived the testator, but died during the life of *Hester Lynde*; and the question was, whether *J. Benyon* took a vested interest in the 100*l.* three *per cent.* annuities, which entitled his personal representative to call for the stock after the death of *Hester*? The *Master of the Rolls* was of opinion, that *J. Benyon* had a vested interest in the annuities, and that his personal representative was entitled to them.

The next case was *Scurfield* v. *Howes*,(*b*) where the testatrix being entitled to a mortgage debt of 500*l.* directed her executors to permit *Susanna*, wife of *Michel Homer*, to take the interest to her separate use for life; and if the mortgage should be discharged, she directed

(*x*) 9 Ves. 507.
(*y*) 1 Bro. C. C. 298.
(*z*) Ibid. 386 and see *Exel* v. *Wallace*, 2 Ves. sen. 118.
(*a*) 2 Bro. C. C. 75, ed. by Belt.
(*b*) 3 Bro. C. C. 90.

the money to be invested in government securities to the same use. And *after* the death of *Susanna*, the testatrix gave the principal sum to the son and daughter of *Susanna*, by a former husband, equally, but if *either* of them died before her mother, the whole was to go to the *survivor*. *Lydia*, the daughter of *Susanna*, died in the lifetime of her mother and brother. Her brother assigned the 500*l.* to the plaintiff, and died intestate *before* his mother. The plaintiff was also his administrator. The mother being dead, the question was, whether the plaintiff was entitled to the *whole* 500*l.* as assignee or administrator of the brother? And the *Master of the Rolls* was of opinion, that the plaintiff was entitled to it in the latter character.

The last decision appears to have been founded upon the following reasons: 1st, that the son and daughter took vested interests in remainder, in the legacy at the death of the testator, liable to be divested as to a moiety in favour of the other legatee upon the decease of the one first dying. And 2dly, that as the brother survived his sister, her share immediately and absolutely vested in him at her death, the will not requiring the surviving legatee to be *in esse* at the death of the mother. Hence, the brother was entitled to a moiety of the fund in his own right, and to the other under the limitation over in the will, which gave a right to his administrator to receive the *whole*, after the death of the tenant for life.

In *Taylor* v. *Longford*,(*c*) the testator directed the interest of his residuary estate to be paid to his two sisters *Hannah* and *Alice* in equal shares during their lives; "and *after* their decease, the principal to be paid *to their children equally*; but which ever sister died before the other, the share which was so paid to her, should be paid to her children in equal proportions; but if such sister so dying, should *leave* no children, *then* the interest to be paid to the survivor for life as aforesaid." *Alice* died without leaving children. *Hannah* had two children at the testator's death, and other two afterwards, but the plaintiff was the only child living at her death, and as such claimed the whole residue under the idea that the gift to the children was contingent until the death of the surviving sister. In opposition to which claim, it was contended for the assignees of two of the other children, that the first words completely disposed of the property after the death of the two sisters, which clearly gave it to *all* the children, and that there was nothing to alter the effect of the gift in the subsequent expressions, which were only applicable to the life interests of the two sisters, and did not touch the principal. Of this opinion was the *Master of the Rolls*, who declared that the property vested in *all* the children.

The next case is, *Wadley* v. *North*.(*d*) There *Thomas Weston* devised and bequeathed his real and personal estates to a trustee, to pay the annual produce to his mother *Ann Weston*, and his sister *Ann Wadley*, during their lives (the moiety of the latter being given to her separate use;) and *from and after* the death of his mother and sister, and the *survivor* of them, to apply the same for the benefit of all the children of his sister who should be living *at her* death, in equal shares, "each *receiving* his or her respective share of the principal upon his or her attaining *the age of twenty-one years*; and

(*c*) 3 Ves. 119. (*d*) 3 Ves. 364.

if one child should be so surviving, in trust to *pay* the whole to such child *upon* his or her *attaining the age of twenty-one years as aforesaid.*" *Ann Weston* and *Ann Wadley* having survived the testator, died; the former in the year 1793, and the latter in the year 1790. *Ann Wadley* had four children living at the testator's death, two of whom died after surviving their mother, in the lifetime of *Ann Weston*, and *under twenty-one*. One of the questions was, whether as the two children died under age, and before *Ann Weston*, the tenant for life, they took vested interests in the property transmissible to their personal representatives? And the *Master of the Rolls* decided in the affirmative, declaring upon the true construction of the will, that the gift to a *surviving* child merely referred to the death of the mother; so that the two children having survived her, took vested interests in their shares, although they died under twenty-one, and in the lifetime of the tenant for life.

Lastly, in *Blamire* v. *Geldart*,(e) the testator gave to *George Pringle*, 200*l.* three *per cent.* consols *at his wife's decease*, and appointed her, *Pringle*, and another person executors, to manage the property, and fulfil the intentions of his will. *Pringle*, the legatee died before the wife, and the question was, whether he took a vested interest in the consols, which entitled his personal representative to a transfer of them, the testator's widow being dead? And Sir *W. Grant*, M. R. determined in the affirmative, and thus expressed himself: "If the testator had given the stock to his wife for life, and at her death to *Pringle*, the latter would clearly have had a vested interest in the nature of a remainder. In a will, it is not material in what order the clauses are arranged. The question is, what is the effect upon the whole? This testator begins by giving to *Pringle* the stock at the death of his wife, and then gives to his wife the whole of his property. Consequently, she has a life interest in that stock so given to *Pringle* at her death, for it is part of the testator's property not antecedently disposed of. Thus the will, no matter in what order, divides the fund between these two persons; giving to one the interest for life, and to the other the capital at her decease. In effect and substance *Pringle* took a remainder, which became *vested* immediately upon the testator's death, and was not defeated by his own death in the lifetime of the wife."

3. We shall now proceed to consider the cases which form exceptions to the general rule, that legacies in remainder vest at the same times as the particular interests previously given.

It has been settled by a variety of cases, that if only the *interest* or *dividends* of property be bequeathed for life, and the context of the will show that no interest in the *principal* was intended to pass until after the determination of the life estate, the remainder will not vest during the continuance of the particular estate, because there is no disposition of the *capital* distinct from the period appointed for the payment or distribution of it, viz. upon the death of the tenant for life. But to prevent the vesting of the remainder, the contents

(e) 16 Ves. 314 and see *Weedon* v. *Fell*, 2 Atk. 123. *Hatch* v. *Mills*, 1 Eden, 342. *Devisme* v. *Mello*, 1 Bro. C. C. 537. *Corbyn* v. *French*, 4 Ves. 418. Lady *Lincoln* v. *Pelham*, 10 Ves. 166. *Walker* v. *Shore*, 15 Ves. 122. *Hallifax* v. *Wilson*, 16 Ves. 168. *Walker* v. *Main*, 1 Jac. & Walk. 1 and *Ante*, Chap. II. sect. 1. p. 45.

of the will must clearly show such to be the testator's intention, for we have seen that, whether the interest, or the fund itself be given to or in trust for *A.* for life, with remainder to *B.* absolutely, the remainder will vest in *B.* at the death of the testator, the intent being that *B.* should have the capital at all events at the demise of *A.*, on whose account alone, the enjoyment of it by *B.* was postponed. The preceding and following cases will illustrate these remarks.

In *Billingsley* v. *Wills*,(*f*) the testator gave to his brother *Capel Billingsley, the interest* of 1500*l.* for life, and from and after his decease he gave the *said sum* of 1500*l.* to all the *younger* sons, and to all the daughters of *Capel*, equally, to be paid to them at their ages of twenty-one; declaring, that *no elder son*, if there should be more than one son, nor *any elder daughter*, if there were only daughters of *Capel living at his decease*, should have any share or interest in the 1500*l.* But if all the children of *Capel*, except one, died before twenty-one, then he gave 1000*l.*, part of the 1500*l.*, to such surviving only child to be paid at twenty-one. *Capel* had three children when the will was made, and another child after the testator's death. *Letitia*, one of the three children married and attained twenty-one, but died before her father. The question was, whether she having attained twenty-one, but during the life of her father, was notwithstanding entitled to a vested interest in a share of the 1500*l.*, so as to transmit it to her husband, the defendant, her personal representative? And Lord *Hardwicke* determined that *Letitia* took no vested interest, but that the shares in remainder were contingent during the life of *Capel Billingsley*, since there was no gift of the capital previously to his death, the objects to take it being uncertain till that event happened, and consequently, the time of payment being annexed to the substance of the gift of the legacy which was at the death of *Capel*,) as *Letitia* was not then living, she took no interest in it which she could transmit to her personal representative.(*g*)

So in *Thicknesse* v. *Liege*,(*h*) Mr. *Berenger* bequeathed his residuary estate to his executors in trust to place at interest, and then proceeded, "I will that the interest money, and the rents of my houses, &c. which my executors shall receive, be placed at interest, except only if it happen that my daughter survive her husband; for then my will is, that my said trustees pay to her every year during *life* all the interest of the residue of my estate, and of its increase by interest, rents, or otherwise, and that *after* her decease *they divide* equally among her issue all the said residuary estate and increase; but that division to be only when the *youngest* of them shall be twenty-one years old; and if any of them be then dead, leaving lawful issue, then the guardian of that lawful issue may receive its share. But if my daughter *die without any child*, or the youngest of them shall not attain twenty-one, and none of them shall have left lawful issue, then I will that my residuary estate and its increase be divided into four parts; one of which I give to *Peter Liege* (the respondent,) &c." The testator's daughter, *Elizabeth*, wife of *John Lanove*, had a child named *Mary*, six years old when the will was

(*f*) 3 Atk. 219. (*g*) See the case of *Hoghton* v. *Whitgreave*, 1 Jac. & Wal. 146.
(*h*) 3 Bro. Parl. Ca. 365. 373. 8vo. ed.

made, who survived the testator, and to whom he was godfather. She married the appellant *Thicknesse*, attained twenty-one, and died before him, leaving four children who died in infancy; and they and their mother *Mary* died before *Elizabeth;* but *Joyce*, the survivor of the children did not die till after the death of Mr. *Lanove*, the husband of *Elizabeth*. *Elizabeth*, having survived her husband, became entitled to the interest of the residue for life; and the question which arose upon her death was, whether the appellant, *Thicknesse*, who represented *Joyce* and his wife *Mary*, was entitled to the residue, or the donees in the will, who claimed it, as *Elizabeth Lanove* left no child at her death? And Lord *Bathurst* decreed, that according to the true construction of the will, the limitation over had taken effect; and he ordered the property to be divided among the donees; a decree, which proving unsatisfactory to Mr. *Thicknesse*, he appealed from it to the House of Lords, insisting that the residue vested absolutely in *Mary*, his late wife, upon her attaining twenty-one, subject to her mother's right to receive the interest for life. But the Lords were of a different opinion, and affirmed Lord *Bathurst's* decree.

The ground for the final decision seems to have been, the *clear intention* of the testator that all the limitations of the beneficial interest in his residuary property should be *contingent*, and no person take a vested interest in it before the right of enjoyment accrued. That it so appeared from the plan of the will, and the necessary construction of it, in order to make the instrument consistent and effectual, was proved by the reasoning of the counsel for the respondents, who contended, with success, that there was no *substantive* gift to make the legacy immediately vested, but that the gift and the time of payment were one and the same, viz. after the death of *Elizabeth Lanove*. The limitations in the will clearly showed that the testator meant, *first*, to provide for his daughter, upon the *contingency* of her surviving her husband, and afterwards for *such* of her issue as should be *living at her death*; and if there were none, then for *such* of his relations named in the will, or their issue as should be *then* alive.

Similar in principle with the last case, is that of *Reeves* v. *Brymer*,(*i*) in which *Michael Foster* bequeathed to his wife *Taumason*, the *interest* and *dividends* of 5000*l.* four *per cent* bank annuities for life, which 5000*l.* he directed should be continued in the same stock, and then be shared equally among his children *then* living. He also gave to his wife a leasehold house and premises in his possession, for life, and then to be let, and the net produce to be equally placed in the stocks for the benefit of his children who should be *then living*, in equal shares. Upon a question whether the bequest to the children was vested at the death of the testator, or remained contingent during the life of *Taumason*, it was determined, that according to the true construction of the will, the legacies did not vest during her life; the words "then living" being grammatically referrible to the period of her death, and not to the testator.

Also in *Bennett* v. *Seymour*,(*k*) Archbishop *Wake* having six daughters, settled by deed the surplus of his real and personal es-

(*i*) 4 Ves. 692, and see *Leake* v. *Robinson*, 2 Meriv. 363. also the Duke of *Manchester* v. *Bonham*, 3 Ves. 61. *Pyle* v. *Price*, 6 Ves. 779. (*k*) Ambl. 521.

tates (in the event of his making no testamentary disposition of them) in trust after his death, for his wife *for* life, with a direction after both their deaths, if she made no such appointment by will, that his trustees should sell the lands, and equally divide the proceeds and his residuary personal property, among his six daughters; the share of each to be placed at interest, and such interest paid to them respectively *for life* for their separate uses; and after their respective deaths, the *capital* share of each daughter was to be paid to *all* her children by her first husband (*excepting* an *eldest* or *only* son *for the time being*) in equal proportions; and if but one, then to such only child; to be *paid* to sons at twenty-one, and to daughters at that age or marriage, with benefit of *survivorship*, in the event of the death of any of them before their shares became *payable*. But if all the children of *any* of his daughters by her first husband, *except as aforesaid*, died *before* their respective shares became *payable* as aforesaid, the testator directed that those shares should go to the *eldest* or only *son* of such daughter or daughters, at his age of twenty-one. And *in case* one or more of his three eldest daughters, *Ann Seymour*, *Ethelred Bennett*, and *Hester Brodripp*, should die, without any child or children *living at her or their deaths*; or, there being such, all of them should die before their or any of their shares should *become payable* under the aforesaid trusts, *then* the share of the same daughter or daughters should, *from and after* the *decease* of the same daughter or daughters, and failure of her or their children, *go* to *all* the children *then living*, or after to be born of the *other or others of them the said three last named daughters*, to be paid as the shares of such other of the same three daughters, would have been payable to her or their children under the aforesaid trusts, if such daughter or daughters had been *then* actually dead. And if *all* the said three eldest daughters *died without children living at their deaths*; or, there being such, *all* of them should die before their shares *became payable* under the aforesaid trusts, then such shares should go to the children *then living*, or after to be born of the *three youngest* daughters. The deed contained a similar proviso in regard to the shares of the three youngest children, with the ultimate limitation to the three eldest. The wife being dead without making an appointment, the Archbishop made a will, devising his residuary, real and personal estate, upon the same trusts as expressed in the deed. His daughter *Hester* had issue by her husband, *Richard Brodripp*, one son and a daughter, both of whom died *before their mother*. The son *attained twenty-one*, and died intestate. His mother *Hester* married again, and died leaving *Thomas Strode*, her second husband, her executor. The question was, whether as the son attained twenty-one, the capital share (the interest of which was given to his mother *Hester* for life,) did not vest in him, although he died before her, so as to be transmissible to his personal representatives; or whether according to the true construction of the will, the share was contingent during the life of the mother, so as to entitle the children of the other two eldest daughters to it under the limitations over in that instrument, since *Hester* died without leaving a child? And Lord *Hardwicke* was of opinion, that the interest in the capital share was contingent during *Hester's* life, and he determined against the claim of her son's personal representatives.

The report is silent as to the reasons upon which Lord *Hardwicke* formed his opinion. They may, however, be inferred from the contents of the will; whence it seems clear that the testator did not intend that any child's original share should vest before the death of its mother. This appears, first, from the exception, out of the bequest to children, of an *eldest* or *only* son for *the time being*. Expressions which can only have effect by postponing the vesting of the children's shares to the death of the tenants for life. Secondly, it so appears from the testator's including the *eldest* or *only* son of a daughter *leaving no other children at her death*. Thirdly, it so appears from the limitation over, in the event of any of the three eldest daughters *dying without children*, to the children of the other two eldest daughters *then living*. And lastly, it so appears from the executory bequest to the children *then living* of the three youngest daughters, upon the contingency of the three eldest *dying without children living at those periods*. Each class of children were substituted for the others, upon the happening of events, which could only arise upon the supposition, that the vesting of the children's original shares was deferred till the deaths of their parents. Upon these grounds, it is presumed, Lord *Hardwicke* was of opinion that the interests in remainder were contingent, during the lives of the daughters, the tenants for life.

Upon similar reasoning, the case of *Smith* v. *Vaughan*(*l*) was decided. There Mr. *Terrell* bequeathed to trustees, an annuity of 200*l*. issuing out of the *Exchequer*, in trust to pay it to his sister *Rebecca Vaughan*, for life, and after her death to assign it unto and for the use of *all* her children equally; and *if she should leave but one child*, then the whole was to be assigned to *that one*. *Rebecca* had only one child, which died before her, and the question was, whether the reversionary interest in the annuity vested in that child during its mother's life? And the *Master of the Rolls* determined in the negative.

That the reversionary interest in the last case was intended to be in contingency during the mother's life, may be collected from the terms of the will; for it is obvious that the testator meant the children of his sister, if more than one, to take the annuity as tenants in common; and if one only *at her death*, that one to take the *whole*. But if the interest were to vest in the children as they came *in esse* during the life of their mother, their shares would be transmitted to their personal representatives, although they died before her; a construction which would defeat the testator's intention; as he expressly declared, that if *Rebecca* left only *one* child at her death, it should take the *whole* annuity. Under those circumstances the Court could not but be of opinion that the division of the annuity was to take place at *Rebecca's* death, among *such* of her children as were *then* living, a construction which rendered the will consistent in all its parts; and as she left no child, the bequest necessarily failed for want of an object.

In the following case of *residue*, the circumstance of children being *in esse* when the will was made in conjunction with a particular clause in it, was declared to be the chief reason why the Court held

(*l*) Vin. Abr. tit. "Devise," 381. pl. 32.

the remainder to children to be contingent until the death of the tenant for life.

The case alluded to is *Spencer* v. *Bullock*,(*m*) in which the testator gave to his executors 1600*l.* in trust to invest in stock, and to transfer it to his son, *John Spencer*, at twenty-one, with a direction to apply the intermediate dividends towards his maintenance, &c. The testator gave another sum of 1600*l.* to his executors, upon a similar trust for his daughter *Tabitha*, at twenty-one, or marriage. He also gave a farther sum of 1600*l.* to be laid out in the same manner, to accumulate during the life of his son-in-law, *John Hart*, and after his death the principal and accumulations were to be transferred to his daughter, *Elizabeth Hart;* but if she died before her husband, without leaving issue, the money was to fall into the residue. The testator then gave to his executors his residuary estate, to be equally divided among his four children, *Jane*, *Elizabeth*, *John*, and *Tabitha;* directing the shares of *John*, *Elizabeth* and *Tabitha*, to be invested upon the like trusts as their previous legacies of 1600*l.* a piece, and the share of *Jane* to be invested for her separate use for life, and the principal for her children at her decease, in equal shares: *provided* if any of his children died before their legacies or shares became payable without having issue, he gave their shares to the survivors; but if they *left* any children, such children were to take the shares of their parents, as tenants in common, if more than one child, and *if but one, it was to take the whole.* *Jane* had three children at *date of the will*, who survived her. She had other three at the testator's death, and three more afterwards; and of the latter six children, *three died before her*, whose father was their administrator; and he claimed in that character three-ninths of the residue; contending that the children took vested interests at the death of the testator. But Lord *Alvanley*, M. R. was of opinion that the vesting was suspended during the life of *Jane*.

The above opinion was chiefly founded, as Lord *Alvanley* declared, upon the circumstance of *Jane* having three children when the will was made. For if those children had been considered to take vested interests, and happened to die before the testator, there would have been a partial intestacy. In addition to this, the testator anxiously stipulated, that if any of his children left but *one* child, it was to take the *whole* share, a declaration quite inconsistent with an intention to give vested interests to children during the lives of their parents. His Lordship, therefore, disallowed the claim of the father, and ordered the share of *Jane* to be distributed in sixths, among her surviving children.

It has been shown that legacies given at future periods (which must arrive,) in the nature of remainders, vest immediately with the particular estates, except under particular circumstances. We shall next consider—

SECT. IV. The vesting in interest and transmissibility of contingent executory bequests.

It is a rule of construction in regard to contingent executory bequests, that the interests of the first and subsequent takers, *quodam*

(*m*) 2 Ves. jun. 687. and see *Matthews* v. *Paul*, 2 Wils. C. C. 64. 74.

modo, vest *uno instanti;* so that if the substituted legatee die before the contingency happens, upon which he is to succeed to the legacy, his representative will notwithstanding be entitled to it so soon as the event shall take place.(*n*) Suppose then a bequest be made to *A.*, but if *A.* died under twenty-one, or without leaving children or issue, to *B.*, although *B.* happened to die before *A.*, *B.'s* personal representative would be entitled to receive the legacy upon the happening of the contingency, on the ground of its being vested in right in *B.* previously to his decease(*o*).

Thus in *Pinbury* v. *Elkin*(*p*), the testator appointed his wife executrix, and gave her all his goods and chattels; *but if she died without issue by him*, then the property was to remain after her decease to his brother *J. S.* *J. S.*, after surviving the testator, died before the wife, who afterwards died without issue. One of the questions was, whether, as *J. S.* died before the wife, the legacy was gone, or his personal representative was entitled to it? The solution of which question depended upon this, whether the inchoate right *vested* in *J. S.* at the death of the testator. And it having been determined that the event upon which the legacy was given to *J. S.* was not too remote, Lord *Parker*, Ch., said he was of opinion, that this *possibility* went to the executors of the legatee. He therefore decided in favour of the representative of *J. S.*

So in *Barnes* v. *Allen*(*q*), where Mr. *Allen* bequeathed his residuary personal estate in trust for his wife for life, and after her death to their children. And if his wife should live until such children attained twenty-one, he then directed his trustees to transfer the securities upon which the property should be placed to his wife, and to such children who should attain their said ages, or the survivors or survivor of them, equally. *But if it should happen that his wife should die leaving no such child or children living at her death*, then he directed his trustees to transfer all such securities to his brothers *James* and *Henry;* and if any or either of them should be *then* dead, to the *survivor* for his own use and benefit. The testator died without leaving issue by his wife, and *Henry* survived his brother *James;* but *both* of them died, after surviving the testator during the life of the wife. The question was, whether the plaintiff, the executor of *Henry* the surviving brother, was entitled to the whole residue; which depended upon this, whether *Henry* took a vested interest in the whole? And Lord *Thurlow* decided in the affirmative; remarking, that a *contingent* interest might *vest in right*, although it did not in possession; and that contingent or executory interests might be as completely vested, as if they were in possession. He therefore declared, that, subject to the widow's life interest, the residue *vested* in *James* and *Henry* as joint tenants; and that as *Henry* survived his brother, the whole, subject as aforesaid, belonged to the plaintiff, his executor.

The two last authorities were followed by *Stanley* v. *Wise*.(*r*)

(*n*) *Chauncy* v. *Graydon*, 2 Atk. 616. (*o*) *Anon.* 2 Ventr. 347.
(*p*) 1 P. Will. 563.
(*q*) 1 Bro. C. C. 181. ed. by Belt. 3 Ves. 208. where this case is stated from Reg. Lib.
(*r*) 1 Cox, 432. and see Fearne's Ex. Dev. 555. 7 ed. and *Wilmot* v. *Wilmot*, 8 Ves. 10.

In that case the testator, having four daughters, three of whom were named *Mary*, *Sarah*, and *Elizabeth*, bequeathed to *Mary* and *Sarah* 4000*l.* a-piece; *but* if either of them died *unmarried*, he empowered her to dispose of 400*l.*, part of her 4000*l.*; and the residue of that sum (3600*l.*) he directed to go and be divided among his surviving daughters, and the *children* of such of them as should be *then* dead; the children taking their mothers' share. *Sarah* died unmarried. *Elizabeth* had five children, two of whom survived *Sarah*, and the other three died before her; and it is presumed that *Elizabeth* also died before *Sarah*. The question was, whether the interests of *Elizabeth's* children in the 3600*l.* vested as they came *in esse*, subject to be divested upon the contingency of *Sarah's* marriage, so as to entitle the representatives of the three children dying before *Sarah* (who did not marry) to equal shares with the two children who survived her? And Lord *Kenyon*, M. R., was of opinion, that all *Elizabeth's* children took vested interests, and that the fund was divisible in fifths.

It may be asked whether, as the interest in the executory bequest vests in the *second* legatee, so as to be transmissible to his personal representatives notwithstanding his death before the contingency happened, that circumstance will not prevent the interest from vesting in the *first* legatee. We shall therefore consider in the next place—

SECT. V. The effect upon the vesting and devesting of legacies, when they are subject to a limitation over upon the happening of a particular event.

1. Where the gift is *immediate*, with a limitation to "survivors" upon the death of any of the legatees without leaving issue, or under the age of twenty-one years.

Sir *William Grant*, M. R., expressed himself to the following effect, as to the rule of construction applying to the present subject: "I take it to be clear that a devise over upon a contingency has not the effect of preventing the shares of legatees from vesting in the mean time, provided the words of bequest be, in other respects, sufficient to pass a *present* interest; but that such a devise over of the entirety may be called *in aid of other circumstances* to show that *no present interest* was intended to pass."(*s*)

This being so, the following may be asserted as a general proposition: That if a legacy be given to *A.*, and no time of payment be expressed, or it is directed to be paid at twenty-one, and if *A.* die before that age, then to *B.* the legacy will vest in *A.* at the death of the testator, subject to be divested in the event of his dying under twenty-one. Hence, if there be several infant legatees of the same fund, and the bequest be made to them as tenants in common, with or without a direction for payment at their several ages of twenty-one, but if any of them die under that age, then to the *survivors;* or if *all* of them previously die, then to *B.;* those bequests over will not prevent the immediate vesting of the legacies, until one of the legatees, attain twenty-one; but, on the contrary, the legacies will im-

(*s*) 3 Meriv. 340. and see *Shepherd* v. *Ingram*, Ambl. 448. and *Lyon* v. *Mitchell*, 1 Mad. 467. 472.

mediately vest *sub modo*; *i. e.* subject to be devested upon the happening of the contingencies, on which they are given over. As examples of these remarks.

In *Deane* v. *Test*,(*t*) Mr. *Hoskins* bequeathed to his sister *Deane's* children an additional legacy of 2000*l.* to be paid out of a particular fund, and to be divided among them in equal shares; but if any of them died under twenty-one, their proportions were to go over and be paid to the survivors. The question was, whether the children took vested interests in their shares at the testator's death, liable to be devested upon their dying under twenty-one? And Lord *Eldon* decided in the affirmative, upon the principle that the bequest to them was immediate. And his Lordship said, that the consequence of the children taking vested interests would be, that if any of them died under twenty-one, the produce, at least the interest, accrued from the death of the testator, would go to the child, although it would take nothing in the capital.

It is to be noticed, that the principle entitling the legatees to interest in the last case is this, that the legacy was due and payable at the testator's death. The enjoyment of it was not expressly postponed until the legatees attained the age of twenty-one; for, had the payment been deferred to that period, they could not have claimed interest during the intermediate time; because, they not being entitled to receive the capital before that age, their right to interest, which could only accrue upon delay in payment of the principal, would have been defective.(*u*)

So in *Davidson* v. *Dallas*,(*x*) the bequest was "to the children of *Robert Davidson* in equal shares, and if either of them died under twenty-one, their shares to go to the survivors." The question was, whether the legacy vested in the children at the testator's death, so as to exclude those which were afterwards born? which depended upon this, whether the *division* and the *vesting* of the fund were to take place at the former period? And Lord *Eldon* said, "that the legacy was vested, subject to be devested by the death of any of the children under twenty-one, leaving another child surviving; that it was an immediate legacy to the children living at the testator's death, in whom it vested at that time, in equal proportions, with a limitation over, if either of them died under that age, to the survivors; that the periods of division and vesting were one and the same, viz. the death of the testator; and that, therefore, those children only who were living at that time were entitled."(*y*)

In the last two cases, the events upon which the legacies were to go over are definite, and clearly expressed, and therefore the testator's intention easily performed. But

2. When the event, upon which a legacy is limited over, is not so clearly conceived and expressed by the testator as to satisfy a court of equity of his intention; or, if understood, to enable it to carry that intention into execution, the bequest over will be defeated, and the primary legatee will take an indefeasible vested interest at the death of the testator.

Cases of this description may arise when a testator, after an im-

(*t*) 9 Ves. 147. 152. (*u*) See *Ante*, sect. 3. p. 383. (*x*) 14 Ves. 576.
(*y*) In relation to this subject, see Chap. II. sect. 1.

mediate gift to a legatee, declares, that if he (the legatee) die before he *might* have received the money, or before it *might* have been recovered,(*z*) the legacy shall go over to *B.* In those instances the intention is conceived and expressed with so little certainty in regard to the time when *B.* is to take it, that a court of equity will not venture to act upon it; consequently, the interest will vest in the first legatee immediately and absolutely, and he will be entitled to payment of the legacy at the end of a year after the testator's death.

In *Hutchin* v. *Mannington*,(*a*) the testator, after noticing that his fortune was vested upon securities in the *East Indies*, gave several legacies. Most of them were particular to several of his brothers and sisters, with *clauses* annexed to each, directing that "*if* the legatee should die before he or she *might have received* the legacy, it should go to the children of the legatee equally, and in default of issue, among the other brothers and sisters." Then the testator, after stating how much the legacies would amount to, gave the residue (calculating the amount) to his father absolutely, "but *in case of his death before he might have received it*," he gave it to his brothers and sisters and their children. The testator died about the year 1781, and his father in 1784, without having received any part of the residue; and the question was, whether the brothers and sisters were entitled to it under the limitation over, or the father took an absolute vested interest in the fund at the death of the testator, so as to entitle his personal representative to claim it, although the father died before receipt of any portion of it; upon the ground that the bequest over, if the father died before he might have received the residue, was an event so uncertain, and so impracticable to ascertain, as to be insufficient to divest the bequest which had vested in the father? And Lord *Thurlow* was of opinion, that the father took an absolute vested interest in the property at the death of the testator, and consequently that the brothers and sisters had no title.

His *Lordship's* reasons for the above opinion were these; that, although there was a faint indication of an intent that there should be some time or other when the interests of the legatee should go over, yet the testator had not conceived that intention, and expressed it with sufficient definite certainty, that the Court could act upon it; that it was too uncertain. But his Lordship remarked, if the testator had given *any time* which could be discovered affording some rule to go by, his intention should prevail.(*b*)

3. Hence it may be considered, that if the testator had declared the bequest over should take place, in the event of the legatee dying *before he received* the property, or *before the fund was actually realised* by the executor, the executory limitation would have been good.(*c*)

To that effect Lord *Thurlow* had previously determined in the case of *Faulkener* v. *Hollingsworth*, stated by Sir *W. Grant* in *Elwin*

(*z*) *Wood* v. *Penoyre*, 13 Ves. 325. (*a*) 1 Ves. jun. 366.
(*b*) See Lord *Eldon's* comments upon this case, 11 Ves. 497.
(*c*) 11 Ves. 497. 502. and see *ante*, sect. 2. p. 376.

v. *Elwin*,(*d*) a decision followed by the latter Judge in the case just referred to, which was as follows:

Caleb Elwin, after devising to his wife several freehold and copyhold estates for life, upon condition that she released, as she did, her title to dower in his other real property, directed that his brother, *Peter Elwin*, should, so soon after his wife's death or refusal to release her dower as conveniently might be, sell all his lands, &c.; and he gave the produce and the intermediate rents to be paid to and equally divided among his five nephews, children of *Peter*, "at such time as the sale should be completed, in case they were then living; but if any of them died before him (the testator,) *or previously to the sale of the estates should be completed*, leaving issue, then his or their shares were to be equally divided among his or their children," &c. The estates were not sold during the life of *Peter*, the nephew, who, after surviving the testator's wife, died leaving three children. And the question was, whether, as the sale of the property did not take place before the death of the nephew *Peter*, the share of it, intended for him, did not belong to his children, by virtue of the limitation over depending upon that event? And Sir *W. Grant* determined in their favour, upon the principle, that the executory bequest did not rest upon any difficulty, or an uncertain event. The words were *clear*, requiring no construction, and the event easily to be ascertained.

It is a consequence from what has been said, that wherever a testator has defectively expressed the event upon which a legacy shall go over, yet, if his meaning can be discovered from a reasonable construction of the whole will, the Court will effectuate the intention, when it is practicable. Suppose then the event to devest a legacy is thus described; "in case of the death of the legatee," without annexing to those terms his dying within any particular period; the Court will put a construction upon those words founded on the testator's intention, collected from the contents of his will. We shall therefore proceed to consider—

4. The construction to be put upon a clause divesting and limiting over a bequest "in case of the death of the legatee," generally.

The words in which such a bequest over is expressed, neither have nor by construction have they received a precise and definite meaning, in which they must be uniformly understood. The expression itself is incorrect, as it applies words of contingency to an event which is certain. No person can with propriety speak of death as a contingent event, which may or may not happen. When therefore a testator so expresses himself, the question is, what he means by that inaccurate expression. He may perhaps have had some contingency in his mind; as that the legatee was dead at the time he was making the will, or might die before the testator, or before the legacy should be payable, and then the inaccuracy consists in not specifying the period to which the death was to be referred. He might have meant to speak generally of the death whenever it might happen, and then the contingent or conditional words must be rejected, and words of absolute signification must be

(*d*) 8 Ves. 547.

introduced; and accordingly, in every instance in which these words have been used, Courts have endeavoured to collect from the nature and circumstances of the bequest, or the context of the will, in which sense it is most likely this doubtful and ambiguous expression was employed.(*e*) In treating of this subject, we must distinguish between *immediate* bequests with a limitation over "in case of the death of the legatees," and when such clauses are annexed to legacies given at *future* periods, as after the determination of preceding interest for lives. And—

FIRST when the legacy is *immediate*, but made defeasible "in case of the death of the legatee."

It is a settled rule upon this subject, that if a legacy be given to *A.* generally, "and in case of his death," to *B.*, those expressions, unexplained by the context of the will, are to be confined to the event of death happening during the life of the testator; so that, if the legatee survive him, the legacy will immediately vest, discharged of the executory bequest to *B.*; and *parol evidence* that the testator used the words in a different sense cannot be admitted.

Thus in *Lowfield* v. *Stoneham*,(*f*) the testator gave to his brother *John Stoneham*, 1000*l.* "and in case of his death," to the defendant *Susannah*. It appeared that *John* survived the testator; and the plaintiff insisted that the legacy vested absolutely in *John*, and was assets in the hands of the defendant who had received it. *Parol* evidence was offered by the defendant to prove that the testator *in extremis* declared he meant only to give to *John* the interest of the 1000*l.* and that the defendant should have the principal if she survived him; but the evidence was rejected by the Court, as being inadmissible to contradict the plain words of the will; and it seems that the plaintiff, as representing *John Stoneham*, was adjudged to be entitled to the legacy, which consequently must have vested in him at the testator's death, discharged of the limitation over to *Susannah*.

The last case was acknowledged by the Master of the Rolls in *Hinckley* v. *Simmons*,(*g*) where the testatrix bequeathed to her sister *Mary Hinckley* all her fortune, and whatever she had power to leave; "and in case of *Mary's* death," she gave all she had to her mother. *Mary* survived the testatrix, and it was determined that she took an absolute vested interest in the property at the death of the testatrix, and that the limitation over depended upon her dying *before* the testatrix.

So also in *Turner* v. *Moore*,(*h*) the bequest was of 15,000*l.* three *per cent.* consols to the testator's nephew *Robert Dalrymple*, then or lately residing in *India*, "or in the case of his death," to his issue, but if *Robert* should be dead at the decease of the testator without leaving issue (events which happened,) then the testator gave 3000*l.* of the stock to *John Turner*, "*or* in case of his decease," to his issue. He bequeathed in the like manner 3000*l.* further part of the stock, to *Robert Turner*, or his issue; and he gave 6000*l.* or other part of the stock, to his cousin *Ramsey*, "*or* in case of his death to his issue.

(*e*) 8 Ves. 21.
(*f*) 2 Stra, 1261. mentioned by the Master of the Rolls in *Cambridge* v. *Rous*, *infra*, p. 408. (*g*) 4 Ves. 161. (*h*) 6 Ves. 557.

Sir *W. Grant* determined that the two legatees took absolute vested interests in the capitals, at the death of the testator.

It is perceptible in the last will, that the testator's intention was consistent with the rule established by the preceding cases, where the instruments afforded no such testimony. The gifts were made to the legatees; *or*, in the event of their deaths, to their issue, plainly showing the intent, that if the parent survived the testator, he alone should take the absolute interest, and his children nothing. This intention was corroborated in the bequest to *Robert*, for he was supposed to be in *India* at the date of the will, and the testator was ignorant whether he were then living or dead; *or*, if dead, whether he left any issue. But it was obvious that if he should survive the testator, he was intended to take the fund absolutely; and it was equally clear, that if he were then dead, leaving issue, the latter were meant to be substituted in his place. The rule of construction being thus established in relation to the first bequest, could not, with propriety, be varied in expounding the same words, occurring again in other parts of the will.

The attention of the same Judge was again called to a similar question in *Cambridge* v. *Rous*,(*i*) in which Mr. *Van Mierop*, being in the *East Indies*, bequeathed to his eldest sister *Martha* 400*l.*; "and in case of her death," to devolve upon her sister *Cornelia*. He also gave to *Cornelia* the like sum of money, "and in case of her death," to devolve upon *Martha* Both the sisters survived the testator, and Sir *William Grant* decided that the absolute interest in the legacies vested in them at the testator's death.

Similar to the case of *Turner* v. *Moore*, the testator was in the case last stated, at a great distance from his sisters, and might have been in uncertainty as to their being living or dead. In the absence of a contrary intention appearing, the presumption is natural, that he meant to make a separate and independent provision for each sister, if both should live to take the benefit; consequently, the expression, "in case of her death," must have been used as words of contingency to denote the death of either sister before the testator, a construction which vested absolute interests in both of them at the testator's decease, as in the preceding cases.(*k*)

In the following authority, there was a variation in the expressions, and still the determination was the same; the natural construction of the words were considered to import dispositions in the alternative, and not a mere gift to one person for life, with remainder to another.

The case alluded to is *Webster* v. *Hale*,(*l*) in which Mr. *Findlay* bequeathed in trust for the use, exclusive right, and property of his sister *Clementina*, 8000*l. Irish five per cents.*; "*but* should she happen to die," then and in that case the above mentioned sum was to be equally divided among her children. He also gave to *Clementina* 4000*l. three per cent.* reduced stock to be *paid to her* as soon as possible, "*or* in the event of her death," the said sum was to be

(*i*) 8 Ves. 13. 21.

(*k*) See the judgment, 8 Ves. 23. and the case next stated, ibid, 413. See *Montagu* v. *Nucella*, 1 Russ. 165

(*l*) 8 Ves. 410. To the same effect see *Slade* v. *Milner*, 4 Madd. 144. and *Ommaney* v. *Bevan*, 18 Ves. 291.

equally divided among her children. The testator then gave to his sister *Helen* 1000*l*. *East India* stock, "and in case of her death," the stock was to be equally divided among her children. Lastly, he bequeathed to Mrs. *Findlay* 2000*l*. *three per cent.* reduced stock, to be paid to her as soon as possible, and to be entirely at her disposal, and *Janet Walker* 1000*l*. in the *four per cents.*

His Honour remarked, that the two bequests to *Clementina* pointed more to *alternative* dispositions, than to gifts in succession; viz. to her for life, and afterwards to her children. In the first, the word "but" was disjunctive and adversative. It opposed one case to another, and implied that the children were to take in an event different from that of the parent. In the second bequest the direction was for payment *to Clementina* as soon as possible, "*or* in the event of her death," among her children; a direction affording strong implication of the testator's meaning to give *to Clementina* the entire and absolute property. Such being the apparent intention in regard to those two legacies, his Honour, after commenting upon the others, was of opinion that the testator's meaning was the same in regard to his sister *Helen*, and therefore adjudged that both sisters took absolute vested interests in their legacies at the testator's death; their own demises being, according to the rule before stated, restrained to the contingency of that event happening during the life of the testator.

SECOND. When the gift of the legacy is *not immediate*, but in *remainder* after an estate for life, with a bequest over, in case of the death of the legatee."

The avowed end and aim of every construction being to give effect to the intention of testators as expressed in or collected from their will, it seems that where a bequest is not immediate, but in remainder, with an executory limitation, "in case of the death of the legatee;" those expressions will be applied to the period when the remainder takes effect in possession, viz. the death of the person taking the preceding interest. Suppose, then, the annual produce of 1000*l*. to be bequeathed to *A*. for life, and the capital in remainder to *B*. "and in case of the death of *B*." to *C*. The happening of *B*.'s death will not be confined to that of the testator, so as absolutely to vest the legacy in *B*. upon surviving him, as in the preceding cases; but the event of *B*. dying will be continued during the life of *A*. the tenant for life: consequently, if the contingency happen during that period, the interest, which conditionally vested in *B*., will be divested, and the legacy go over to *C*.

An instance of this kind occurred in *Galland* v. *Leonard*(*m*.) In that case *Francis Mell* bequeathed his residuary personal estate in trust for his *wife for life*, with a direction to the trustees to divide the trust fund, after the death of his wife, between his daughters *Hannah* and *Ann*, for their own use; "and, in case of the death of his daughters, or either of them, leaving a child or children," to apply a sufficient part of the interest towards their maintenance, during minority; and upon their attaining twenty-one, to distribute the capital among them, *per stirpes*; remainder over if the daughters left no issue which attained twenty-one. The wife and two

(*m*) 1 Swanst. 161.

daughters survived the testator, the former of whom is still living. And the question was, whether the daughters took, absolute and indefeasibly vested, interests in the residue at the testator's death? a question which depended upon this preliminary consideration; viz. whether the events of the daughters dying were to be restricted to the death of the testator, or to subsist in contingency during the life of the widow? And Sir *Thomas Plumer*, M. R. determined, 1st, that the gifts to the daughters were absolute, though defeasible in the event of their dying within a particular time; and, 2dly, that such period was not limited to the death of the testator, but was to continue during the life of the widow.

So in *Harvey* v. *M'Laughlin*(*n*,) a case in the court of *Exchequer*, the bequest was to a trustee of 1600*l.* Old *South Sea* annuities to pay the dividends to *Eleanor Todd for life*, to her separate use; remainder as to the capital, to be equally divided among *Eleanor's* three children; "and in case of the death of either of them, the share of such as might die was to go to and belong to the children, or the child if but one, of the persons so dying." One of the three children (a son,) after surviving the testator, died before the widow, leaving children. And the question was between his administratrix and his children; the former contending that the event of the son's death was limited to its happening during the life of the testator; whereas the latter insisted that the contingency was intended to subsist until the death of the widow, the tenant for life of the fund, which event having taken place, established their title under the executory limitation in the will. And so the Court decided, and declared, that "the shares of *Eleanor's* three children vested in them, subject to be divested in case of the deaths of any of them in her lifetime," (to which must be added) if they left children(*o*.)

In all the instances which have been produced it was obviously the intention of testators to give the absolute property in the funds to the legatees, with a *contingent* limitation over upon the deaths of those legatees within a particular period; which, from the defective manner of expression, it was frequently difficult to ascertain. But when it appears from the contents of a will to have been the meaning of a testator in adopting the terms "in case of the death" of a legatee, that the legacy should go over upon his decease *whenever it might happen*, then the words denoting contingency will be rejected, and words of *absolute* signification introduced; the effect of which will be to give the first taker only an estate *for life*, and the absolute interest to the persons in remainder; interests which will vest in the several legatees in manner described in the third section(*p*). We shall therefore proceed to consider—

Thirdly, the instances in which a limitation over "in case of the death of the legatee" does not import contingency, but the words are used in the sense of the death of the legatee generally, whenever the event shall happen.

In *Billings* v. *Sandom*,(*q*) the testator gave to his sister *Sarah*,

(*n*) 1 Price, 264.
(*o*) See *infra*, p. 412. in this sect. sub-div. 5.
(*p*) *Ante*, p. 392–3.
(*q*) 1 Bro. C. C. 393.

1000*l.* "and in case of her demise" to the plaintiff and another person. And, after bequeathing several legacies, he gave to *Sarah*, whom he appointed executrix, his residuary personal estate, *to be disposed of as she thought proper*. The question arose upon the clause "in case of her demise," *viz.* whether the words alluded to the death of *Sarah* generally, or to the contingency of her dying before the testator? And Lord *Thurlow* determined, that no contingent or alternate bequest was intended in the present case, but that it was the meaning of the testator that *Sarah* should enjoy the legacy of 1000*l.* for life, and the persons in remainder be entitled to the capital after her decease.

His Lordship appears to have founded his opinion upon the internal evidence supplied by the will. The testator distinguished between absolute bequest and the gift of a partial interest. When he intended *Sarah* to take the entire property, he expressly said so, as in the disposition to her of the residue; and when he intended to give her no more than a qualified estate, he meant to express it, but so incorrectly from the terms he adopted, that they imported an absolute bequest defeasible upon a contingency instead of a limitation for life. The testator's intention, however, being apparent, the Court rejected the words of seeming contingency "in case of," and substituted for them the words "*at*" or "*upon*." With which alteration the clause stood thus: "I give to *Sarah*, 1000*l.*, and at or upon her demise, I give the money to," &c.; a form of bequest which would give *Sarah* an interest for life, with a vested remainder to the persons to whom it was limited.

The principle of the last decision was adopted by Lord *Rosslyn* in Lord *Douglas* v. *Chalmer*,(*r*) in which Lady *Greenwich* bequeathed her residuary personal estate (subject to the payment of a preceding legacy and any other bequests she should make by a codicil,) in trust "for and to the use of her daughter, Lady *Douglas; and in case of her decease*, to the use of her children equally." By a codicil made two years subsequent to the date of the will, the testatrix, among a variety of specific bequests, "gave her finest diamond ring to Lady *Douglas;*" and her wearing apparel, &c. to *Mary Monk*, "or, if she should be dead *before her*" (the testatrix,) then to another person. The question was, whether Lady *Douglas* took the residue absolutely, as she survived the testatrix, or an interest in it for life only, with remainder to her children? And the Chancellor decided that her Ladyship was merely entitled for life.

It was upon the particular circumstances of the case that Lord *Rosslyn* made the above decree. As the testator in *Billings* v. *Sandom*, so the testatrix, in the present case, showed, that when she meant to give an absolute interest, she did so in express terms, of which the gift of the diamond ring to Lady *Douglas*, and of the linen to *Mary Monk*, are proofs. The bequest to *Mary Monk* further manifested, that when the testatrix intended to give an absolute legacy, defeasible upon the death of the legatee *before* her, she declared such her intention; a circumstance which raised a strong presumption, that if her meaning had been the same in relation to Lady *Douglas*, she would have used similar words. In addition to these

(*r*) 2 Ves. jun. 501.

circumstances, the bequest to her Ladyship of a ring was unnecessary and inconsistent with an intent to give her an absolute interest in the residue, but quite consistent with an intention that she should take the residuary property for life only. Those reasons induced Lord *Rosslyn* to conclude that the testatrix meant the children to take the fund after the death of their mother, whenever it should happen; a conclusion which was authorized by the before stated case of *Billings* v. *Sandom*, and by no means contradictory to the cases before referred to in relation to the present subject.

Questions have arisen upon the construction of limitations over of legacies in the events of the legatees "dying unmarried" or "without being married," *viz*, whether the expressions were meant without *ever* having been married, or without being under coverture when the legatees died. If the first interpretation were adopted, then upon the marriages of the legatees the limitations over would be defeated; if the second prevailed, the deaths of legatees who were *then* unmarried would divest their interests, and give effect to the limitations over, notwithstanding the previous marriages of the legatees which had determined before their deaths. It is, however, settled in instances where the bequests are immediate, and of the entire interest in the fund, to the legatees, that the words "dying unmarried" or "without being married," are to be taken in the sense of *never* having been married. And if to the words "should the legatee die unmarried," &c. be added "*and* without issue," or, "without having issue," the latter words will be construed in the same restrictive sense as the former, *i. e.* without having children born; and the copulative *and* will be changed into *or*, so that if the legatee marry and have a child, the interest which originally vested in the legatee *sub modo* will become unqualified and absolute, notwithstanding he may afterwards die a widower, and leave no child. But if he die married without ever having had a child, his interest will be divested, and the limitation over take place. We must, however, distinguish between cases like those just mentioned, and cases where the interest of a legacy is given to a parent for life, and the capital to his children with a limitation over "in case he die without children." For in the latter, the contingency of the parent dying without children, can only mean without children at the time of his death.(*s*) These distinctions will appear upon considering—

5. The construction which has been judicially put upon the words "dying unmarried," or "without being married *and* having children."

In *Maberley* v. *Strode*,(*t*) the testator gave to trustees his residuary estate, in trust to pay the interest to his son *Samuel Strode*, for life, remainder, as to the capital, to divide it among all *Samuel's* children, "but in case *Samuel* died unmarried *and* without issue," or having issue, the sons should die under twenty-one, and the daughters before that age or marriage, then in trust to transfer the fund to his nephews and nieces. *Samuel* married and died without issue; and one of the questions was, whether, as *Samuel* did not die unmarried, the limitation over was not disappointed, and an intestacy created? But Lord *Alvanley* determined in the negative, de-

(*s*) 7 Ves. 459. (*t*) 3 Ves. 450. 454.

claring first, that the word "unmarried" is to be understood to import as never having been married; and the word "and" to be changed for "or," so as to make a double contingency; consequently, although *Samuel* married, yet, as the alternative event happened, *i. e.* his death without leaving a child, the limitation to the nephews and nieces took place.

The reader will have remarked, that according to the distinction made in the observations prefatory to this subdivision, if children had been born to *Samuel*, and all of them had died before him, still the limitation over would have taken place; for nothing was given to them until his death; a circumstance explanatory of the terms "in case he shall die without issue," and showing that they were used in the sense of his death without *leaving* issue.

The next case differs from the preceding in this respect: that the gift was *immediate* to the legatees of the residuary estate, with an executory bequest over, "in case any of them died without being married, and having children."

The case alluded to is *Bell* v. *Phyn*,(*u*) in which Mr. *Phyn* bequeathed the residue of his personal estate equally among his three children, *George*, *Jane* and *Catherine*; but if any of them died "without being married and *having* children," the share of such child was to be distributed among the survivors. After the death of the testator, *Jane* married, and *having* a child, the question was, whether she took an absolute vested interest in a third part of the residue? which depended upon the construction of the words "without being married and having children;" for, if the having children was to be considered the same as without leaving children, then her interest would be liable to be devested on the happening of that event. But Sir *William Grant*, M. R., construed the words, "without being married," in the sense of "without ever having been married," upon the authority of *Maberley* v. *Strode*; and after declaring upon the like authority that *or* should be substituted for *and*, he pronounced his opinion that the expressions, "without having children," meant, in the present instance, without having had a child or children. When it followed, that *Jane* having married and had a child, the interest which vested in her at the death of the testatrix became absolute; and so it was decreed.

In regard to construing the words, "without having children," the same as without leaving children, Sir *W. Grant* expressed himself to the following effect: "It is not very reasonable, that if the testator's children should have children who should live to require an expensive education, or to contract marriage, it should be out of the parent's power to touch the capital for either of those purposes, on account of the possibility that the children might die in the life of the parent; although the only consequence of surviving the parent would be, not that the children would take any thing, but that the parent might dispose of the whole as he thought fit. The intention was, to enable the parent to make a provision for the children, which might be in the life of the parent, as well as after the death; and that if the children should live to marry and have

(*u*) 7 Ves. 454. 458.

children, then, as they would require more than the income, the capital was to be at their disposal; but if they should not live to marry or to have children, it was to go over. Such was the *most likely construction*.

That a court of equity, in favour of vested interests, requires the events, which were to divest them, to happen with certainty and in strictness, is not only observable in the preceding cases, but will also appear from considering—

6. Further instances, where events upon which executory limitations are made to depend, were held not to have happened, so as to divest the original legacies.

It is the doctrine of Lord *Alvanley*, upon this subject, that "where there are clear words of gift creating a vested interest, the Court will never permit the absolute gift to be defeated, unless it be perfectly *clear* that the *very case* has happened, in which it is declared that the interest shall not arise; that it must be determined, upon the *words of the will*, there was a vested interest, which was to be devested only upon a given contingency. And the single question was, whether the contingency had happened?"(*x*)

According to this rule, if legacies be given to *A.* and *B.*, and *if either* die during the life of *D.*, then to the survivor living at *D.'s* death, and both die *before D.*; as the bequests vested in *A.* and *B.* at the testator's decease, subject to a contingency which did not happen, the interests which vested conditionally in the legatees, became absolute in both of them upon the death of the survivor before *D.* This instance will apply to others of a similar description, and which will be afterwards noticed.

In *Harrison* v. *Foreman*,(*y*) the testator gave to trustees 40*l.* a year, part of 566*l.* annuities, in trust to pay the dividends to Mrs. *Barnes* for life, for her separate use; and after her death, upon trust to transfer the annuity, or the security upon which it was invested, to *Peter* and *Susannah Stallard*, equally; "and in case of the death of *either* of them before Mrs. *Barnes*, he gave the whole to the *survivor living at her decease*." *Both* the legatees died during the life of Mrs. *Barnes*. The question was, whether their legal personal representatives, or the testator's residuary legatees, were entitled to the 40*l.* annuities? And Lord *Alvanley*, M. R., determined in favour of the former, upon the principle that *Peter* and *Susannah* having taken vested interests in the fund at the death of the testator, subject to be devested in favour of the *survivor* who might be living *at the decease* of the tenant for life; as there was no such survivor *at that period*, the devesting contingency never happened, and consequently the interests at first vested remained undisturbed, which entitled the personal representatives of the two legatees to the property.

So in *Smither* v. *Willock*,(*z*) the bequest was of personal property, and the produce from the sale of real estate, to the testator's wife for life, with remainder, as to the capital, after her decease to be divided among the testator's brothers and sisters; but *if* any of them died *before the wife, their shares were to be distributed among their*

(*x*) 5 Ves. 209. (*y*) Ibid. 207.
(*z*) 9 Ves. 233. see also *Whittell* v. *Dudin*, 2 Jac. & Walk. 279.

children. One of the brothers died during the life of the wife *without ever having had a child.* And Sir *W. Grant*, M. R., declared the share of the deceased brother to be vested, subject to be devested in the event only of his death before the testator's widow *leaving children;* which contingency not having happened, the brother's personal representative was entitled.

And in *Wall* v. *Tomlinson*,(*a*) the testator gave the interest of his residuary estate to his wife for life, and the capital, after her death, to her children; but if she had none (which event happened,) then to Mrs. *Strangeway* absolutely, in case she should have children; *in failure* of which the property was given over. Mrs. *Strangeway* had only one child born alive, and which died before her. The question was, whether the interest which vested in that lady upon the birth of her child was absolute, or it was devested upon her dying without leaving a child, which depended upon the construction of the ambiguous expressions, "in *failure* of which." And Sir *W. Grant* said, it would be very difficult in the present case to give those words the construction of the legatee not leaving children at her death; a construction which would lock up the property during her whole life; and that the testator did not appear to have contemplated the event, which had happened, of the death of the child in the lifetime of its mother.

Also in *Browne* v. Lord *Kenyon*.(*b*) 1000*l.* were bequeathed to trustees to pay the interest to *Abigail Jones* for life, remainder in trust to divide the interest between Miss *Chetwode* and Mrs. *Davison* during their joint lives, and to pay the whole of it to the survivor for life, with remainder in trust after the survivor's death to pay the capital to Sir *John Chetwode;* but if he were *then* dead, to divide it between his two brothers, *Charles* and *Philip Chetwode, or the whole to the survivor. Abigail Jones* died first, then Miss *Chetwode*, afterwards her brother *Charles*, next her brother *Philip*, then Sir *John Chetwode*, and lastly, Mrs. *Davison.* It was determined, that the legacy vested in *Charles* and *Philip* as tenants in common, subject to be devested if *one alone* should survive Mrs. *Davison*, the last tenant for life; and that since there was no survivor in existence at that period, *both* brothers having died before her, the contingency upon which the interest was to be devested never happened; consequently, the personal representatives of each brother were entitled to the fund.

The last case was followed by that of *Sturgess* v. *Pearson*,(*c*) in which the testator gave the interest of one-fifth part of personal property to his daughter, *Ann Tatnall*, for life, and the capital, after her death, to be divided among her three children, *or such of them as should be living at her decease*, payable at twenty-one. The three children died before their mother, and it was decided that the children took vested interests, which were only to be divested in the event of there being some or one of them living at the mother's death, an event which did not happen; for there was not one child in existence at that period, the necessary consequence of which was, that the personal representatives of the children became entitled to the legacy upon the death of the tenant for life.

(*a*) 16 Ves. 413. (*b*) 3 Mad. 410. see also *Laffer* v *Edwards*, ibid. 210.
(*c*) 4 Madd. 411.

So also, if there be several infant legatees of the same fund, as tenants in common, with a direction for payment of their shares at twenty-one, but if *all* of them die under that age without leaving issue, then to *C.*. Although one or more of them die under twenty-one without issue, yet, if another afterwards attain that age, the personal representatives of the deceased children will be entitled to their shares; and for the following reasons: The shares are so given as to vest immediately in all the legatees, subject to be devested in the event of *all* of them dying before twenty-one without issue; and since the contingency upon which those interests were to be devested did not happen, as one child attained that age, they continued vested; therefore, upon the authorities we have been considering, the personal representatives of the deceased children will be entitled to their proportions of the fund.(*d*)

Upon the same principle, if a legacy be given to a person *absolutely*, and a mere *discretionary* authority is intrusted to two or more executors to qualify the bequest, and reduce it to an estate for life, with remainders over; if by any means the authority become incapable of execution, the entire interest which originally vested in the legatee, will become absolute.

Thus in *Keates* v. *Burton*,(*e*) Mr. *Burton* bequeathed 2000*l.* to his natural son, *James Christie*; "but if *his executors* should think it more for the advantage of *James* to have 2000*l.* placed at interest, and to pay him *interest* for life, as it became due, or otherwise in such proportions, and at such times, manner, and form as they *in their discretion* should think fit, they were *authorized* and *empowered* to place the money at interest, as therein mentioned, in their joint names, or in the names of the survivors, and directed to pay him the interest in manner aforesaid during his life," with limitations over. There were four executors, one of whom died before the testator, and the others renounced probate. Under these circumstances the joint authority having become incapable of execution, the question was, whether *James* was entitled for life only, or took a vested absolute interest in the legacy, liable to be devested by the exercise of the power delegated to the executors *jointly*? for if the latter, then, since the event upon which the devesting was to take place could never happen, the assignees of the legatee under an insolvent act would be entitled to the money. And Sir *W. Grant*, M. R. decided the following points: 1st, that this was a mere personal discretionary authority to the executors; which, if not exercised, a court of equity could not execute: 2d, that the gift by will was of the entire property, subject to be divested upon execution of the power: and lastly, that the power being extinct, the interest of the legatee became absolute, as the event could not happen, upon which it was to be divested. His assignee therefore had made out a good title.

It is observable in the before stated cases of *Harrison* v. *Foreman*, *Browne* v. Lord *Kenyon*, and *Sturgess* v. *Pearson*,(*f*) that the limitations to the *surviving* legatees, were to such only as should be living at the deaths of the tenants for life. As, therefore, none of them were in existence at those periods, the contingencies divesting

(*d*) See *Skey* v. *Barnes*, 3 Meriv. 335. 340.
(*e*) 14 Ves. 434.
(*f*) *Ante*, p. 414. *et seq.*

the bequests, made to them generally, never happened; consequently, the interests, which originally vested in *all* the legatees, remained undisturbed, a circumstance that entitled their representatives to the legacies. But this is otherwise, when surviving legatees are not required to be *in esse* at the death of the tenant for life. If, then, the legacy be limited to *A.* for life, and after his death to his two children, *B.* and *C.*, in equal shares, but should either of them die before *A.*, then to the survivor; although *B.* and *C.* die during the life of *A.*; yet *C.*, if he survive *B.*, will be entitled to the whole; because the interest of *B.* was devested by his death before *C.* and became vested in the latter according to the limitation in the will, *C.* not being required to be living at the death of *A.*, the tenant for life, as in the preceding cases; authorities reconciled by this distinction with those of *Scurfield* v. *Howes*, and *Barnes* v. *Allen*, before stated.(g)

Questions indeed have arisen upon the expressions of wills, in reference to the event upon which the limitation over was meant to take place; viz. whether upon the sole contingency of the legatee dying under twenty-one, or upon his death, during the life of a person to whom the fund was given for life, notwithstanding he had attained that age. We shall therefore, consider,—

7. The construction of the words, "payable, &c." in reference to the event introducing a limitation over of legacies or portions if any of the legatees die before their shares become *payable*, or *payable*, *assignable*, and *transferrible*.

FIRST.—Of legacies.

The term "payable" is of ambiguous import, and is capable of being referred either to the period when the legacy is to vest in interest, or to the time when it becomes due. The determination in these instances depends upon a sound interpretation of the will. In the following case the word "payable" was referred to the time of vesting, viz. twenty-one, and not to the period of the legacy becoming actually due.

The case is *Hallifax* v. *Wilson*,(h) in which Mr. *Hodgson* bequeathed the residue of his estate to trustees, upon trust to pay the interest of it to his mother, *Rebecca*, for life, and from and immediately after her death, to pay and transfer the trust fund among his nephew and nieces, *Barbara*, *Thomas*, and *Margaret*, equally; the shares with the accumulating interest to be *paid* or transferred *at twenty-one; but*, if any of the legatees died before their shares became *payable*, such shares were to be equally divided among the survivors or survivor, &c. *Thomas*, one of the legatees, attained twenty-one, but died before *Rebecca*, the tenant for life; and the question was, whether the vested interest that he took in his share at twenty-one, was devested by his death before *Rebecca*? which depended upon the period to which the word "payable" was to be referred. Sir *W. Grant* decided in favour of the personal representative of *Thomas*; observing, that the bequest over being immediately connected with the direction for payment at twenty-one, the natural reference of the words "if any of the legatees die before their shares become *payable*," was to their death under twenty-one.

If such be the construction upon *legacies*, *a fortiori* it must equal-

(g) *Supra*, pp. 394 & 402. (h) 16 Ves. 168.

ly prevail where the objects are children claiming *portions* from a parent. The following distinction must be attended to; that, if to the term "payable," other expressions be added, fairly importing the intention of a testator to divest the interests previously given upon the death of any of the legatees before the tenant for life, and not merely in the event of any of them dying under twenty-one, the interests will be divested accordingly; as in the instance of a limitation over upon the death of any of the legatees before their shares become *payable, assignable,* or *transferrible.* But if the bequest be not mere bounty, as when the objects are children claiming *portions* payable at twenty-one, their parents having life-interest in the fund; those words will generally be construed to mean such children only as shall die under twenty-one, so as to divest the interests of those who attain that age, although they happen to die before their parents. The reason of this distinction will appear in considering—

Second. The construction of the words "payable, assignable, and transferrible," used in the limitations over of *portions,* when the parent has a life-interest, and the portions are directed to be paid at twenty-one.

It is a rule, that a child who has attained twenty-one, or married, is *primâ facie* to be considered entitled to a portion provided for children, upon the ground that an intention is not to be imputed to a father to leave his child, having occasion for a fortune, without one. And, to form an exception to the rule, it must be shown, from the tenor and words of the will or settlement, that the child was not meant to have the provision at that age: an intention that must not be doubtful, but *clear.*(*i*) There must be something in the instrument utterly incompatible with giving the portion at twenty-one. If, then, the terms of the instrument be *ambiguous,* or if there be conflicting or contradictory clauses, so as to leave in a degree uncertain the period at, or the contingency upon which, the portion is to *vest* or be *devested,* it is the inclination of a court of equity to vest the money in sons at twenty-one, and in daughters at that age, or marriage.(*k*) Hence it follows, that if the portion be given over in language which is capable of being referred either to the death of children before twenty-one, or during the lives of their parents, the expressions will be restricted to the period of vesting, *i. e.* in the event of death under twenty-one; for a court of equity considers that it would be very unreasonable to suppose a father to mean that his child having attained twenty-one, or married, and founded a family, should, not take its portion, because it happened to die before him. Upon such argument, the Court interprets the words of the will or settlement by what is fairly presumed to be the intention of the father, considering the relation of the parties; and in doing so, it uses greater latitude than in questions of this kind between strangers, or upon a contract, where there is no ingredient of parental feeling.(*l*)

Suppose, then, a bequest or settlement (for it is immaterial which) (*m*) to be made in trust for *A.*, the wife, for life, and after her death for her children by the testator or settlor, equally; *to be paid*

(*i*) See *Bernard* v. *Montague, ante,* 380.
(*k*) 3 Ves. & Bea. 85. 91.
(*l*) 6 Ves. 507.
(*m*) 16 Ves. 172.

to sons at twenty-one, and to daughters at that age or marriage, except those events happen during the life of *A.*, and then the payment to be postponed till *A.'s* decease; but if any of the children die before their portions or shares become *payable, assignable or transferrible* such shares to go to the *survivors* in the same manner as their original portions; and if all of them die before their portions or shares become payable, &c. then to *B.* Now whether the words "payable," &c. were intended to refer only to children dying under twenty-one, without regard to the death of *A.*, is by no means clear; consequently, a court of equity will, according to the observations before made, consider the expressions "payable," &c. as relating merely to the age of twenty-one, or marriage, so that if a son attain twenty-one, or a daughter attain that age or marry, they will take an indefeasible vested interest in their portions or shares, transmissible to personal representatives, although they happen to die before *A.* It is conceived that the following case establishes the preceding remarks.

In *Jefferies* v. *Reynolds*,(*n*) Exchequer annuities were settled upon husband and wife for their lives, and after their deaths for the children of the marriage, in equal shares, to be assigned and made over to them at their ages of twenty-one happening after the death of the surviving parent; but if any of them attained twenty-one during the lives of their parents, their shares were to be paid, assigned and made over, within three months after the death of the survivor of the parents, unless sooner directed. And *survivorship* among the children was provided, *if any of them died before their shares became payable, assignable, or transferrible.* It was also declared, that if there should be no child, or there being children, if all of them died before any of their shares became payable, assignable, or transferrible, as aforesaid, the annuities should go to the parents, and the survivor of them. There was only *one* child, a son, who attained twenty-one, but died before his mother, who survived her husband. And it was determined, first at the *Rolls*, afterwards by Lord *Northington*, Ch., and ultimately by the *House of Lords*, that the son's executor, and not the mother's, was entitled to the fund.

The comments of Sir *W. Grant* upon the last authority, in *Schenck* v. *Legh*,(*o*) were, that it was a stronger case against the child than the latter; for, said he, "the first declaration in *Jefferies* v. *Reynous*, as to payment at twenty-one, has the qualification of happening *after* the death of the father and mother, and the question was not upon the survivorship between the *children*, but upon the limitation over to the *parents*; as against whom it could not be said to be transferrible till after the death of the survivor." The cases mentioned in note(*p*) apply to the present subject, and may be consulted with advantage.

The next subject for consideration is—

(*n*) Stated 9 Ves. 311. 6 Bro. Parl. Ca. 398. 8vo. ed. (*o*) 9 Ves. 311.

(*p*) *Emperor* v. *Rolfe*, 1 Ves. sen. 208. *Randall* v. *Metcalfe*, 3 Bro. Parl. Ca. 318. 8vo. ed. *Willis* v. *Willis*, 3 Ves. 51. *Hope* v. Lord *Clifden*, 6 Ves. 499. *Schenck* v. *Legh*, 9 Ves. 300. *Powis* v. *Burdett*, ibid. 428. *Bayard* v. *Smith*, 14 Ves. 470. *Walker* v. *Main*, 1 Jac. & Walk. 1. 8. *Howgrave* v. *Cartier*, 3 Ves. & Bea. 79. *Perfect* v. Lord *Curzon*, 5 Madd. 442. *Maitland* v. *Chalie*, 6 ib. 243.

Sect. VI. The effect of powers of appointment upon the vesting and devesting of Legacies or Portions.

1. Where the power is merely to ascertain the shares each legatee is to take.

When the will creating the power provides legacies or portions for a class of persons in common, to be enjoyed after the death of an individual, and simply authorizes that person to fix the amount of each legatee's proportion; the shares will vest in interest in such of them as are alive at the death of the testator, and in others answering the description, as they come into *esse*, during the life of the donee of the power, subject only to be devested, so far as regards the amounts of the shares, by an exercise of the power, provided all the legatees survive the donee of the power; for if any of them die during the donees' life, and before he have executed the power, the interest which vested in the deceased legatee will be devested *if* the donee appoint (as he may) the *whole* fund among the survivors, which was decided by Lord *Thurlow* in *Boyle* v. The Bishop of *Peterborough*;(*q*) a case acknowleged by Lord *Eldon* in *Butcher* v. *Butcher*,(*r*) and by Sir *Thomas Plumer*, who decided the case of *M'Ghie* v. *M'Ghie*,(*s*) upon the authority of the first. But if the donee of the power die without executing it, or make an invalid appointment of the whole fund, then, as the interest which vested in the deceased legatee was never devested, his personal representative, after the death of the donee, will be entitled to an equal share of the property with the other legatees. And if *part* of the fund only be effectually appointed, the *remainder* of it will be divisible among the surviving legatees, and the personal representative of the one deceased, in respect of the vested interests that *all* the legatees took in the *whole* property, subject to the power of appointment; which, as to that residue, is to be considered as never having been made. The following authorities will clearly illustrate the above remarks:

In *Malim* v. *Keighley*, and *Malim* v. *Barker*,(*t*) the bequest was, that if the whole of the testator's residuary personal estate became vested in any one of his three daughters under the trusts previously declared, he gave it to her, with a recommendation to dispose of it, after her death, among the children of his daughter *Ann Malim*, and of his nephew *John Lowe*. The residue became vested in his daughter *Sarah*, who died without issue and intestate, having made no such disposition as desired by the will. The direction was determined to be a trust in favour of the children of *Ann* and *John*, among *all* of whom, as well those living at the testator's death, as those afterwards born, the appointment must have been made, had the power been executed. And Lord *Alvanley* said, that every child which came *in esse* acquired a *vested* interest, liable to be devested by the exercise of the power of appointment; and there being no appointment, he must construe it as if there was no *power;* and it had been frequent-

(*q*) 1 Ves. jun. 299. 3 Bro. C. C. 243. *S. C.* (*r*) 1 Ves. & Bea. 90.
(*s*) 2 Madd. 378. *Vane* v. Lord *Dungannon*, 2 Scho. & Lefroy, 118. 129.
(*t*) 2 Ves. jun. 333. 506. and 3 Ves. 150. and see *Witts* v. *Boddington*, 3 Bro. C. C. 95. ed. by Belt. also *Robinson* v. *Smith*, 6 Mad. 194. stated *infra*, Chap. XXI. on Construction, sect. 6. div. 2. sub-div. 1.

ly determined, that in such a case *all* children coming into *esse* should take. In the present instance, some of the children having died between the death of the testator and the donee of the power, his Lordship declared that their personal representatives were entitled to their shares.

The last case was followed by that of *Bristow* v. *Warde*,(*u*) in which it was agreed, by articles upon the marriage of Mr. and Mrs. *Bristow*, that a sum of money should be invested in *South Sea* annuities, in trust to pay the dividends of part of it to a Mrs. *Foissin* for life, and the remaining dividends to Mr. *Bristow* during the lives of himself and wife; and, if he died before her, leaving *issue* of the marriage, in trust to pay the dividends (subject to the trust for Mrs. *Foissin*) to Mrs. *Bristow* for life, and after her death, to apply the *capital* in such manner as Mr. *Bristow* should by deed or will appoint; and in default of appointment, to be equally divided, after Mrs. *Bristow's* death, among the *issue* of the marriage, at their ages of twenty-one; the intermediate dividends to be applied for their maintenance, with benefit of survivorship upon the death of any of them under twenty-one. Mr. *Bristow* died before his wife, leaving several children; and he by will appointed the fund among them, and in some instances to grandchildren, after limiting interests for life to their parents; and to one daughter, *Catherine*, he had by deed appointed, on her marriage, part of the fund, which he increased by the will. Under these circumstances, Lord *Rosslyn* decided the following points: 1st, that the power of appointing was not indefinite, as it purported to be, but was to be considered as confined to *children;* in which sense also the word "issue" was to be taken; 2d, that in consequence, the appointment to grandchildren was void, but good so far as it limited interests for life to their parents; 3d, that the defective execution of the power in part did not avoid the appointment *in toto;* 4th, that so much of the fund as was ineffectually appointed vested in *all* the children living at the death of the father, the appointor. And lastly, that although the power was executed at *different* times, and not by one single act, and in one instance in augmenting the proportion of a child, yet those several appointments were valid.(*x*)

Shortly after this case was determined, Lord *Alvanley*, M. R., decided that of *Wilson* v. *Pigott*,(*y*) which bore a near resemblance to it, and received a similar decision.

In that case, 4000*l.* were vested in trustees of a marriage settlement, to pay the interest, subject to an annuity to *B.*, to the husband during his life; then to his wife for life, remainder as to the *capital*, in trust equally to divide it among *all* the children of the marriage, except an eldest or only son, at such times and in such proportions as their parents, or the survivor, should by deed or will appoint; and in default of appointment, among such children (except as aforesaid) equally, and to pay the whole to one child, if there should be one only; to be paid to daughters at twenty-one or marriage, and to sons at that age, if their parents and the annuitant should be then dead; if not, immediately after the death of the survivor; with benefit of survivorship among them, upon the death of

(*u*) 2 Ves. jun. 336. (*x*) See 2 Ves. sen. 62. (*y*) 2 Ves. jun. 351.

any of the sons before twenty-one, and of the daughters before that age or marriage; the accrued shares to be paid at the same periods as the original; and the intermediate interest was to be applied for maintenance; but if there was an only, or only surviving son, he was to receive the 4000*l.* at twenty-one, and the intermediate interest for his support. And if there were no *issue*, or all of them died before the fund became payable, it was given to the survivor of the husband and wife. There were four younger children, two sons and two daughters; and upon the marriages of the two daughters and one of the sons, the father appointed 1000*l.* of the 4000*l.* to each of them, but made no appointment of the remaining 1000*l.* His younger son, named *Charles*, never having been married, no appointment was made in his favour, and he died, after attaining twenty-one, before his father. Under these circumstances, the following points were determined: 1st, that the appointments made at *several* times, as in the last case, were good; 2d, that so much of the fund as was not appointed, being an immediate vested interest in all the children as they came *in esse*, was divisible among the three surviving children and the personal representative of *Charles*, there being nothing either in the settlement or the appointments to the three children, which could authorize the Court to give the *whole* of the 1000*l.* to his representative.

The other cases referred to in note(*z*) concur with those before stated in establishing the proposition, that, where by will or settlement legacies or portions are directly given to a class of individuals generally, subject to powers of appointing the property among them, the interests in it will immediately vest in the persons answering the description as they come *in esse*, during the life of the appointor; so that, if no appointment, or only an imperfect or invalid one be made, of the whole or part of the fund, it, or so much of it as is not effectually appointed, will belong to the legatees or donees living at the death of the donee of the power, and to the personal representatives of those who happen to be then dead. And the cases of *Boyle* v. The *Bishop of Peterborough*, *Butcher* v. *Butcher*, and *M'Ghie* v. *M'Ghie*, referred to in the beginning of this section, prove that the interests are not so indefeasibly vested, but that the shares of legatees or donees dying before the donee of the power, may be appointed as parts of the *entire* fund among the *surviving* legatees or donees.

It must be noticed that Lord *Rosslyn*, made a decision irreconcileable with the authorities before stated and referred to, so far as regards the equal distribution among the legatees or donees of so much of the fund as should be either not effectually appointed or not appointed at all. The case alluded to is *Reade* v. *Reade*,(*a*) which the reader will consult. In allusion to it Lord *Eldon* made the following remarks: "Lord *Loughborough* (*Rosslyn*), appears in *Reade* v. *Reade* to have disturbed that doctrine (just stated), giving the unappointed fourth (three having been appointed among three

(*z*) *Gordon* v. *Levi*, Ambl. 364. *Doe* v. *Martin*, 4 Term. Rep. 39. 64. *Smith* v. *Camelford*, 2 Ves. jun. 698. *Vanderzee* v. *Aclom*, 4 Ves. 771. *Butcher* v. *Butcher*, 9 Ves. 382. 1 Ves. & Bea. 79. 99. *S. C.* 1 Scho. & Lefroy, 293. *Vane* v. Lord *Dungannon*, 2 Scho. & Lefroy, 118. (*a*) 5 Ves. 744.

of four children which, according to that old course, would have been divided *among the four*); to the representatives of the deceased child. I do not perfectly understand that case which is quite *novel* in this respect."(*b*)

It is observable that the cases which have been stated, and referred to are instances where from the terms of the instruments the funds were immediately given to the legatees or donees subject to powers delegated to individuals to alter and fix the amounts of the shares by the exercise of a sound discretion. There was no event, upon which the interests that had vested in the several donees or legatees were to be totally devested upon the execution of the power, except the death of any of them before the appointor, and the appointment being made to the survivors, and comprehending the *whole* fund. If, however, there be no such immediate gift, the power authorizing a selection of the objects, and the title of the individuals to take is made to arise and entirely depend upon the execution of the power, and there is no limitation to any of them in default of appointment, the legacies or portions will necessarily be *contingent* until the donee of the power shall have exercised it; as will appear from considering—

2. In what cases the vesting of legacies or portions depends upon the execution of powers of appointment.

Suppose the interest of a sum of money to be bequeathed to or settled upon *A.* for life, remainder in trust of the capital for *such* of the children of *A.* as he should appoint; and no disposition of the fund is made in default of appointment. It is presumed that no child can take a vested interest previously to appointment by *A.*; because, until the power be executed, the objects of the bequest or settlement are uncertain; no particular individuals of the descript class can make out a title under the original instrument; or according to the expressions of Lord *Hardwicke*, "there is no designation to take under the will, but such of the children as *A.* should appoint; and no person can be ascertained under the will, until *A.* has made such appointment.(*c*)

Accordingly in the Duke of *Marlborough* v. Lord *Godolphin*,(*d*) *Charles* Earl of *Sunderland*, bequeathed by will and codicil 30,000*l.* to his wife for life, and after her death to be divided and distributed to and among *such of his* children, and in such manner and proportion as she should appoint, and for no other purpose. The Countess executed her power by deed and will, as she was enabled to do; and by the latter instrument she appointed to two of the children, *John Spencer* and Lady *Morpeth* 17,000*l.* of the trust-fund. These two children died before her, and consequently their shares became lapsed; and to whom they belonged was the question? On the one hand, they were claimed by the representatives of the testator's residuary legatee, and on the other they were claimed by the representatives of *John Spencer* and Lady *Morpeth*, as having vested in those two persons under the testamentary appointment; or, if not so entitled, then the money was claimed by the surviving children and the personal representatives of those who were dead, on the alleged ground that all the children, who outlived the testator, took vested

(*b*) 1 Ves. & Bea. 92. (*c*) 2 Ves. sen. 74.
(*d*) Ibid. 61. 74. 81. see also p. 208. of the same book, and Ambl. 365.

interests in the whole property under his codicil, subject only to be devested as to the proportions by the exercise of the power by the Countess; the execution of which having failed in part by the death of *John Spencer* and Lady *Morpeth*, before the Countess, the appointor, the 17,000*l.* were distributable in the same manner as if no appointment had been made, *viz.* among surviving children and the representatives of those that were dead. But Lord *Hardwicke* determined in favour of the representative of the testator's residuary legatee, and he disposed of the other claims as follows: With respect to the title of the representatives of *John Spencer* and Lady *Morpeth*, under the *testamentary* appointment; he declared it to be without foundation, for the reasons stated in a preceding chapter which treats of "lapsed legacies."(*e*) And in regard to the claims of the surviving children, and the representatives of those who died before the appointor, to an equal distribution of the 17,000*l.* upon the idea of that sum having been vested in all the children under the codicil of Lord *Sunderland*, and not devested by the appointment, in consequence of the two appointees dying before the appointor, Lord *Hardwicke* observed, that the codicil gave no interest to any of the children appeared from the words of it, the gift and distribution being to and among *such* children as the Countess should appoint. He was therefore of opinion that there was no gift to the children otherwise than as they might take by the execution of the power,(*f*) hence it followed, that, as no interest in the fund vested in any child prior to appointment, and the two shares bequeathed to *John Spencer* and Lady *Morpeth*, became eventually unappointed by their deaths before the appointor, neither the surviving children nor the representatives of the two deceased could make a title to them: not the former, because there was no appointment in their favour, nor the latter because the two persons, in whose rights they claimed, never took any interests capable of transmission; the only person therefore, to whom the shares could possibly belong, was the personal representative of the residuary legatee named in the will of the Earl of *Sunderland*.(*g*)

If then, as we have seen, children will not take vested interests in a fund, prior to appointment, limited in remainder to *such* of them as *A.* shall appoint, and there is no limitation over to them in default of appointment; it seems to follow, that the determination must be the same, if the power be restricted to *such younger* children as *A.* shall appoint.(*h*)

But if in the last stated case of the Duke of *Marlborough* v. Lord *Godolphin*, the 30,000*l.* had been given over to the children of Lord *Sunderland* in default of appointment by the Countess, it is conceived that the determination of Lord *Hardwicke* would have been in favour of the surviving children, and the personal representatives of *John Spencer* and *Lady Morpeth;* since, from the effect of the limitation over, all the children would have taken vested interests in the whole fund, subject only to be devested upon execution of the power; and as the appointment failed to the extent of 17,000*l.* those interests would have been devested; a circumstance, which, according to the principle of *Doe* v. *Martin*, and the other cases before stated and referred to, would have entitled the

(*e*) Chap. VIII. sect. 5 p. 337. and see 2 Ves. sen. 75.
(*f*) 2 Ves. sen, 74. (*g*) Ibid. 81. (*h*) See 1 Ves. sen. 210.

surviving children, and the personal representatives of Mr. *Spencer* and Lady *Morpeth* to a distribution of that sum among them.

SECT. VII.—As to vesting generally.

1. Instances of vested interests not being transmissible at the death of the legatees.

It may happen that the interest in a bequest shall be so vested in a legatee, as from the nature and circumstances of the gift it may be considered to be *personal*, and therefore *determine* with his life. A case of this kind occurred in *exparte Davies*,(*i*) in which Mr. *Cottrell* devised his real and personal estates to his wife, during his son *Henry's* minority (which minority he directed should cease on the 1st day of *November* 1805,) upon condition that she should find his son with suitable education, support, and clothing; and after the determination of his son's minority, he gave him a moiety of his income. The testator then directed, that upon his wife's death, (to whom he had given parts of his personalty for life,) the whole of his property should belong to his son; but if he died during minority, the whole was to rest with his said wife *during her life*. He also appointed guardians and trustees for his son, in the event of his wife dying while his son continued a minor; an event which happened; but previously to it she married the petitioner *Davies;* who, as her administrator, claimed such interest in the testator's estate during the infancy of the son, as his late wife would have been entitled to, had she continued alive during the whole of that period. But the *Master of the Rolls* determined against the claim.

The reason for this decision appears to have been the intention of the testator manifested upon his will. It would have been a very extraordinary intentionto impute to this testator, as against his own son, that he meant to give the interest of his fortune to any *stranger* who might happen to be the executor or administrator of the widow. It was quite clear that the testator only intended the interest for her, *provided* she continued to live until her son attained twenty-one, and should be in a situation to find him with suitable education, maintenance, and clothing. He confides that trust, as he expresses, to his *said wife* and to no other person. But contemplating the possibility of her death during his son's minority, the testator provided for that event by appointing for him *guardians* and *trustees;* an appointment, which would have been useless, if the wife had taken beneficially an absolute vested interest in the produce of the son's fortune until he attained twenty-five; for then those trustees would have had nothing to manage; the produce would have been under the controul of the wife's personal representatives, and the son would have been at their mercy for his education and maintenance, although those two objects appear to have been the principal, if not sole, motives of the gift to the wife during the minority of her son, and for which guardians and trustees were specifically appointed in the event of her death before the son attained twenty-five. This intention of the testator was further apparent from the bequest of the *whole* property to the wife for life, if his son died under twenty-five: a limitation, which negatived any intent that she should take a *beneficial* interest in the produce of the estate *before* the happening of that

(*i*) 6 Ves. 147.

event, *viz.* during the son's minority. Under these circumstances, the *Master of the Rolls* was of opinion that the administrator of the wife had no title.

Upon similar principle the decision in the more simple case of *Neal* v. *Hanbury*,(*k*) was founded. There Mr. *Neal* bequeathed 5*l.* a year to his nephew *Thomas*, (not naming executors or administrators), to be paid half yearly *during the life of his wife* on condition that *he behaved himself civilly to her*. *Thomas* died, and his administratrix claimed the annuity during the life of the testator's widow. But his demand was negatived by the *Master of the Rolls*, who said the bequest was *personal* to *Thomas*, which appeared from the condition requiring his civil deportment towards the widow, and could not be observed after his death. The annuity therefore was not transmissible to his personal representative.

2. As to the word "survivors" being construed the same as "others."

Upon this subject, Lord *Eldon* made the following remarks: "The difficulty (he observes) that has always been felt to apply the term 'survivors' to persons who may not be alive at the time when the distribution of the fund is made, has been met by presuming that the testator intended those individuals not then living, but who might come into existence before the distribution; construing the word 'survivors' as 'others' to take in all who should come into existence before that period."(*l*) The same doctrine equally applies in relation to persons who happen to die previously to the time when the fund is payable, when the will shows the intention, that the interests should vest in those persons at a particular period, which they survived. In order to illustrate this remark—

Suppose a bequest to the testator's children, *A.*, *B.* and *C.*, to be paid at twenty-one, but if *B.* or *C.* died under age, then to the *two survivors;* and if two of the legatees died before twenty-one, the *whole* to the surviving child; and if the three died under that age, the *whole* to go to *D.* and *E.* Should *B.* die after attaining twenty-one, and *A.* afterwards *under* that age, leaving *C.;* although *C.*, as the only *surviving* child at the death of *A.*, when his share became payable, would be *literally* entitled to the whole of it; yet, since upon *B.'s* attaining twenty-one, the will showed the intention to have been that all *B.'s* interests under it should vest, the limitation over to *survivors*, in the event of one dying under twenty-one, would be construed as if expressed, "to the *others* of them:" a construction which would vest a moiety of *A.'s* proportion in *B.*, although *B.* died before *A.*, and consequently entitled *B.'s* personal representative to a half of that share.

Such was the case of *Wilmot* v. *Wilmot*,(*m*) in which Mr. *Wilmot* bequeathed to his son *Andrew* one third part of his residuary estate, to be placed at interest for his son's benefit, with a declaration that his son should not be put into possession of it before twenty-five. The remaining two-thirds the testator gave to his two daughters, *Mary* and *Sarah*, to be laid out at interest for their advantage, but possession not to be delivered to them previous to their ages of twenty-one. And if *either* of them died under twenty-one, her third

(*k*) Pre. Cha. 173. (*l*) 14 Ves. 578. (*m*) 8 Ves. 10.

part was to be equally divided between the *two surviving children*; but in the event of the death of two children, the *whole* was to devolve to the surviving child. And if the three children died before twenty-one, the whole was to go to the testator's brothers, *A.* and *B.* *Mary* attained twenty-one, and received her share; she afterwards married, and died in the lifetime of *Andrew* and *Sarah*, and of her husband, who was her administrator. *Andrew* then died under twenty-one; consequently *Sarah* was the only *surviving* child at the period when *Andrew's* share became payable under the limitation over, and as such, she and her husband claimed the whole of it; a demand resisted by the administrator of *Mary*, who claimed in her right a moiety, upon the principle that all the interests given to her by the will vested upon her arriving at the age of twenty-one; a proposition which necessarily included what she might eventually become entitled to receive, if either her brother or sister did not live to the periods at which their shares were made payable. And of that opinion was Lord *Eldon*, who, in deciding in favour of the administrator, thus expressed himself: "It must be argued, that the word 'surviving' means the same as 'other,' or 'living at the age aforesaid.' In the clause in which the gift over is made, it was never meant that *any portion* should be taken; it was to be either the *whole* or *none*. I think they are right in contending that this is vested."

3. Instances have occurred of sums of money being directed to be laid out in the purchase of annuities for legatees during life; and in consequence of their deaths before the money was so invested, questions have arisen between their personal representatives and the persons entitled to the fund to which that money belonged; the former claiming the gross sums, as having *vested* in the legatees at the death of the testators; and the latter insisiting that the bequests were of annuities only, and therefore, since the legatees died before the money was so invested, it ought not to be taken out of the general estate. It is, however, settled, that when it is clearly ascertained to have been a testator's intention that a gross sum was to be sunk in annuities for the benefit of a legatee, and not the interest of it alone given to him for life, he will take a vested interest in the principal, immediately upon the death of the testator, which will entitle his personal representatives to the money, although he happen to die the day after the testator's decease; and upon this principle: the gift to or in trust for the legatee being of the absolute property in the capital, and not abridged by the mode of enjoyment prescribed by the testator, entitled the legatee to the money; and a court of equity, at the suit of a legatee so circumstanced, will order it to be paid to him, and not to be laid out in the purchase of an annuity.

In *Yates* v. *Compton*,(*n*) the testator directed his executor to sell his real estate, and with the proceeds, together with his personal property, to purchase an annuity for the life of *Jane Styles*. *Jane* died before the annuity was purchased, and even before the lands were sold, and yet her administrator was held to be entitled to the money.

So in *Barnes* v. *Rowley*,(*o*) a legacy was given to be laid out in

(*n*) 2 P. Will. 308. 311. (*o*) 3 Ves. 305.

an annuity for the life of the legatee; and it was determined to be a vested interest at the death of the testator, and the personal representative of the legatee therefore entitled to the whole sum.

Similar to the case of *Yates* v. *Campton* was that of *Bayley* v. *Bishop*,(*p*) with this difference, that the sale of the estate was postponed to the death of a tenant for life. The testator, after devising his lands to his wife for life, directed them to be sold after her decease to pay legacies, one of which (500*l.*) he directed his trustees to invest in the purchase of an annuity for his son for life, and to permit him to receive it. Notwithstanding the son died before the wife, and consequently before the sale of the property, and an investment of the 500*l.* in the purchase of an annuity could be made, yet Sir *W. Grant* decreed the principal sum to the administratrix of the son, upon the authority of the preceding cases.

The last case was followed by Sir *Thomas Plumer*, M. R., in *Palmer* v. *Craufurd*,(*q*) a case attended with very particular circumstances. There the testator gave to trustees 3000*l.* to be invested in their names, on the life of his brother *George Craufurd*, in the purchase of a government life-annuity, of the value of 3000*l.*, *to be received by them*, and *paid to him every six weeks*, for his life; with a condition annexed to the gift, which he performed. *George* received an annual allowance from the testator, through the medium of the latter's agents in *Holland*, where *George* resided; and the testator, after the date of his will, directed those agents by letter to continue the allowance after his death, until his executors had arranged his affairs. He also left a writing without a date, declaratory of his resolution to give such an order to those agents, for *George's* subsistence, and until the executors *declared* their *readiness* to carry into effect the clause in the will respecting him; observing, that by this manner of preventing his death being an inconvenience to *George*, he the better enabled his executors to make arrangements with the other legatees. The 3000*l.* were never invested as directed by the will, owing to *George's* absence in *Holland*, ill health, and other obstacles, which prevented his appearance at the government annuity-office in this country—an indispensable preliminary to the investment being made. Up to his death *George* received his usual allowance; and *before* that event, the trustees were prepared to have made the investment, had he been able to appear at the office. Sir *Thomas Plumer* declared, that notwithstanding the circumstances which had occurred subsequently to the will, *George* took a vested interest in the 3000*l.* which entitled his executors to receive the money; but that since *George*, instead of the government life-annuity, had been paid his allowance from the testator's death, which (amounting to 1050*l.*) was admitted to be equal in value with such an annuity, and in consequence had overdrawn the estate of the testator, the Court was of opinion, that the legacy should be reduced in the latter sum; and it adopted the following arrangement:—Interest was directed to be computed on the legacy of 3000*l.*; and the 1050*l.* was to be considered as so much received by *George* on account of principal and interest.

(*p*) 9 Ves. 6. (*q*) 2 Wils. C. C. 79. 3 Swan. 482. *S. C.*

4. Legacies are sometimes given to persons generally, with the additional expressions, "to be at their disposal." Those bequests are considered to be immediate vested interests in the legatees, so as to be transmissible to their personal representatives, although they make no disposition of the property.

Thus in *Robinson* v. *Dusgate*,(*r*) the testator devised lands to *B.* for life, remainder to *C.* in fee, he paying 400*l.*; 200*l.* of which to be "at the disposal of his wife *by will*, to whom she should think fit to give the same." The wife died intestate, and the plaintiff, her administrator, claimed the 200*l.* The Court was of opinion, that the whole interest and property in the money vested in the wife, and that her administrator was entitled to it.

The last case was followed by Sir *Thomas Sewell*, M. R. in *Maskelyne* v. *Maskelyne*,(*s*) where the testator gave 300*l.* to his brother *James*, "to be disposed of by *will* as he should think fit." Upon a question, whether *James* had only a power to dispose of the money by will, or took any and what interest in it, the Master of the Rolls declared, that the legacy absolutely vested in *James*.

So in *Hixon* v. *Oliver*,(*t*) Mr. *Oliver* bequeathed 300*l.* to his wife, "to be disposed of as she thought proper, to be paid after her death:" a bequest placed between an annuity to the wife, and a specific legacy of a leasehold house limited to her for life. The wife survived the testator, and died intestate, having made no disposition of the 300*l.* Lord *Erskine* determined, that the wife took a vested absolute interest in the legacy at the husband's death, which entitled her administrator to receive it.

The legacy will equally vest in the legatee absolutely, although it be given over in the event of his dying "without disposing of it;" because the absolute interest in the fund having once vested, to which a power of spending or otherwise disposing of it is incident, the executory limitation over of the property, "if the legatee do not dispose of it," is a conditional defeasance, repugnant to the original bequest, and cannot therefore be supported; consequently, the estate of the legatee not being devested, his personal representative will be entitled to the legacy, if it be not received by the legatee during his life.

Upon this reasoning, Sir *Thomas Plumer*, M. R., decided the case of *Ross* v. *Ross*,(*u*) in which the testator, a native of *Scotland*, gave to his son *James Ross* 2000*l.*, *payable* at twenty-five, or between twenty-one and twenty-five, at the discretion of his executors, with intermediate interest for maintenance; "and in case *James* should not receive, or dispose of by will, or otherwise, in his lifetime, the 2000*l.*, then it should return, and be paid to the heir entail in possession of the *Shandwick* estate for the time being." *James*, after surviving the testator, attained twenty-five, and died intestate before receipt of the money, which was claimed by his administrator, upon the ground that *James* took a vested absolute interest, which was not devested by his death without having disposed of the fund; the clause purporting to have that effect being repugnant and void. And the Court was of that opinion, and decreed the legacy to the administrator.

(*r*) 2 Vern. 181. (*s*) Ambl. 750. (*t*) 13 Ves. 108. (*u*) 1 Jac. & Walk. 154.

It is observable, in the cases we have just been considering, that the bequests were made in forms, which imparted to the legatees absolute dominion over the property, and amounted to absolute gifts to them of the whole interest in the subjects of disposition. But when a *particular* estate is limited in the instrument, followed by a declaration that the legatee may dispose of the fund, he will not take a beneficial interest in the capital. He will have a mere *power* to dispose of it, and no more; because, where a *limited* interest is *expressly* given, its enlargement by *implication* will not be permitted. If, then, the interest of 1000*l.* be given to *A.* for *life*, with a declaration that he may dispose of the principal at his death, the prior limitation will not merge in the general power of disposition; so that *A.* will take a vested interest for *life*, with a power to appoint the capital.

Thus in *Nannock* v. *Horton*,(*x*) Mr. *Norman* bequeathed to trustees 8000*l.* three *per cent.* consols, to pay the *dividends* to his son *Robert* for *life*, and after his death to pay and transfer 6000*l.*, part of the capital, to such persons as *Robert* should appoint by deed or will. The testator, by a codicil, directed that *Robert* should be paid the dividends for life of 6000*l.* only, part of the 8000*l.* three *per cent.* consols, and at his death he should be at liberty to dispose of 4000*l.*, part of the 6000*l.* three *per cent.* consols, instead of the whole of the latter sum. The question was, whether, under the will and codicil of the father, *Robert*, took a vested absolute interest in the 4000*l.* stock, or merely an estate for *life*, with a power of appointing the capital? And Lord *Eldon* determined that, under the will, *Robert* was entitled for *life* only, with a *power* to appoint the 4000*l.* stock; a right which was not varied by the codicil, except as to the *quantum* of stock over which the power extended by the will.

5. When a legacy is expressed to be given to answer a particular purpose for the benefit of the legatee, which purpose is disappointed, and cannot take effect.(*y*)

Where a legacy is given to a person to answer a particular purpose, to which it becomes impossible to appropriate it, but from no fault in the legatee, he will be entitled to the money: as in instances of a sum of money being left for the benefit of an infant, as an apprentice fee, and he is never placed in the situation or character of an apprentice; or when a legacy is given to a person to assist him in defraying the expenses necessary to procure priest's orders, and he becomes a lunatic; in each case the legacy will vest at the testator's death, and upon this principal: It is considered that the property was intended for the legatee at all events, and that the mode directed for its application was merely a secondary consideration, and independent of the gift.

Accordingly, in *Barlow* v. *Grant*,(*z*) the bequest was of 30*l.* to *A.*, an infant, to bind him an apprentice. *A.* died before attaining a proper age to be placed out an apprentice; and the question was, whether his executor was entitled to receive the money? which depended upon a preliminary question, whether *A.* took a vested interest in the legacy? The Court, in determining in favour of *A.'s*

(*x*) 7 Ves. 392. 394. 398. and see "Law of Husband and Wife," 2 vol. pp. 205, &c. 1 P. Will. 149. (*y*) Vide *supra*, p. 377. (*z*) 1 Vern. 255.

executor, necessarily decided that *A.* took a vested interest in the fund previously to his death.

Similar to the last is the case of *Nevill* v. *Nevill*,(*a*) in which the testator gave 500*l.* to the eldest son of *John Nevill*, "to place him out apprentice; or, as in the *registrar's* book, "for putting him forth either to law or merchandise." *John* had a son born after the death of the testator, who claimed the legacy, although he was unfit to be placed out as directed by the will. Yet the legacy was ordered to be paid; a decree which must have been founded upon the legatee's having taken a vested interest in the money at the death of the testator.

So in *Barton* v. *Cooke*,(*b*) Mr. *Cowling* directed his executors to apply "100*l.* for the board and education of *James Barton*, until he were fit to be put out apprentice, and that *then* they should pay the further sum of 100*l.* with him as an apprentice fee." It appeared that *James* attained the age of nineteen, but had not been placed out an apprentice. The question was, whether he was entitled to the legacies of 100*l.* each; and Lord *Alvanley* decided in the affirmative, remarking, "that if a legacy be given for benefit of an infant one way, and it cannot be so applied, it may be applied for his benefit in another.(*c*)

CHAPTER XI.

Of vested Legacies payable out of Real Estate.

HAVING in the last chapter treated of the vesting of legacies payable out of personal estate, the subject next in order is the vesting of legacies payable out of real property, and which will be discussed under the following arrangement:

SECT. I. Where the gift of a legacy or portion is *immediate*, and the *payment postponed* until the legatee attains twenty-one, or marries.

Legacy contingent *so far as it affects the real estate, and* vested *so far as regards the personal estate.*

SECT. II. When payment of the legacy or portion is not postponed on account of the age of the legatee or child, but in regard to the convenience of the person, or the circumstances of the estate charged with it.

Vested, *although the legatee or child die before the time of payment.*

(*a*) 2 Vern. 431. ed by Raithby. (*b*) 5 Ves. 462.
(*c*) See the case of *Lewis* v. *Lewis*, 1 Cox, 162. stated *infra*, Chap. XIV. sect. 2. sub-div. 4. See also *Hammond* v. *Neame*, 1 Swan. 35. *infra*.

Sect. I Where the gift of a legacy or portion is *immediate*, and the *payment postponed* until the legatee attains twenty-one, or marries.

It was noticed in the beginning of the second section of the last chapter, that courts of equity, in their construction upon the vesting of personal bequests make a difference when the words "payable" or "paid," are or are not inserted in the form of the bequest; determining in the first case in favour of immediate vesting, and in the second against it. These courts, however, have adopted the above distinction as a mere positive rule, in compliance with the practice of the Ecclesiastical Court, which in these matters has a concurrent jurisdiction, and not from any conviction of the soundness of the rule. They have, on the contrary, generally expressed a disapprobation of the distinction, even where they have been under the necessity of adopting it. In gifts, therefore, of legacies or portions *orignally* payable out of, or *charged* upon *real* estate, as such dispositions are not within the Ecclesiastical jurisdiction, Courts of Equity have not found themselves obliged for the sake of conformity to adopt the same rule of construction; they have, therefore, required the *whole condition*, upon which the legacies or portions were given to be complied with, viz. the attainment of the legatee to the age of twenty-one, &c.; nor do they admit of any exception whether the legacies or portions were made payable at twenty-one, or given *at* twenty-one, or with or without interest. This distinction, however, must be noticed, that when legacies or portions are *charged* both upon the real and personal estates, if the legatees die before the time of payment, the legacies or portions will sink into the land, in all cases where they would be held to sink, if the fund consisted of real estate only; and they will be considered vested, with regard to the personal estate, in all cases in which the same would be so adjudged, if the fund consisted of personal property only. And it is immaterial whether the provisions be made by deed or will.

The case of *Pawlett* v. *Pawlett*(*a*) is a leading one upon the present subject. Lord *Pawlett* settled by deed real property in trustees for a term of years in remainder after his death, upon trust, after payment of his debts, to pay such sums of money and maintenance for younger children, as his Lordship should appoint by will; and, in default of appointment, to raise 4000*l.* a-piece for each such child, *payable at twenty-one* or marriage, with maintenance in the intermediate time. Lord *Pawlett* appointed by will to his two daughters, and only younger children, *Susanna* and *Vere*, 4000*l.* each, to be raised and paid in manner, and at the times, and with the maintenance prescribed by the deed. Both daughters survived him. But *Vere* died under age, and unmarried, before any part of her portion could be raised; and her mother was her administratrix, who claimed her portion. The question was, whether such claim could be supported, as *Vere* died under twenty-one, and unmarried. And the *Lord Keeper* determined in the negative: observing, that "the portion was to come wholly out of the lands, and the personal estate no way subjected or made liable to the payment of it by the will."

(*a*) 1 Vern. 321. affirmed by the House of Lords.

Upon the authority of the last case, the Master of the Rolls decided that of *Smith* v. *Smith*,(*b*) in which a testator devised real estates to his son at the age of twenty-one, charged with so much of his daughter's portion, as should not be raised by his executors and trustees before that period; and he gave to his daughter 1000*l.*; *to be paid at* twenty-one or marriage, and to be raised out of the rents and profits of the lands; but if his son died under, age, &c. he gave the estates to *B.*, who was to make the portion 2000*l.* At the death of the testator, his son and daughter were infants; the elder not being more than *three* years old. The daughter died shortly after the testator, an infant and unmarred, as did the son under twenty-one, after surviving the daughter. Their mother, who was the personal representative of the daughter, claimed either the whole or some part of the 2000*l.*, insisting, that her daughter took a vested interest, although she died during infancy and unmarried. But the Court was of a different opinion, upon the ground that the provision was a *portion*, payable out of real estate, which failed by the death of the daughter before the time appointed for raising it.

The next case decided upon the authority of *Pawlett* v. *Pawlett*, was *Yates* v. *Phettiplace*.(*c*) There the testator gave to his daughter a portion of 3000*l.*, directing that if his personal estate should be applied in discharging a debt he owed upon mortgage, the mortgage should be kept on foot to make good the portion, which was *to be paid* at twenty-one or marriage with consent, but reducible to 1000*l.* if his daughter married without consent. The daughter died at six years of age, and it was adjudged by Lord *Somers*, that the portion should not be raised for her administratrix.

In allusion to that case, Lord *Hardwicke* said it was rightly decided, for if the portion had vested, and it had been charged upon the *personalty only*, it would have been transmissible; but being *originally* a charge upon the lands, and the legatee dying before the day of payment, it lapsed to sink into the inheritance for the benefit of the heir, according to the established rule of a court of equity.

In order to make the portion *originally* payable out of the real estate, his Lordship must have considered that such was the testator's intention, as appeared from the direction given respecting the mortgage, the effect of which was to fix the land with the amount of the portion under any circumstances. For if the personalty were applied in exonerating the real estate of the mortgage, the portion was to be substituted in the place of the debt; or, if the debt was paid out of the lands, then the personal fund, to the extent of the 3000*l.*, which, in the ordinary administration of assets, was first liable to exonerate the real estate of the debt, being saved to the personal, would amount, in substance to the application of so much of the *real* proceeds, in discharge of the portion. Hence, the portion being solely payable out of the land to the daughter at twenty-one, her death under that age necessarily occasioned a lapse of it in favour of the heir, according to the rule before mentioned; a rule founded upon this reason, as expressed by Lord *Hardwicke* to the following

(*b*) 2 Vern. 92.
(*c*) 2 Vern. 416. Pre. Ch. 140. *S. C.* approved by Lord *Hardwicke* in *Reynish* v. *Martin*, 3 Atk. 335.

effect: "I have often heard it said, that the reason why legacies, &c. charged on land, payable at a future day, shall not be raised if the legatee die before the day of payment, though it is otherwise in the case of a charge on the personal estate, is this, that the *heir* is a favourite with a court of equity, and ought to have the preference of the representative of a legatee; and likewise, that the Court will go as far as it can in keeping the real estate entire, and as free from incumbrances as possible. But I think the Court has never gone upon such reason, but the true reason I take to be, that the Court will govern itself, so far as is consistent with equity, by the rules of the common law. In the instance of personal estate, the rule is the same here as in the civil law, that there may be uniformity of judgments in the different Courts; but in the case of lands, the rule of the common law has always been adhered to: as suppose a person should covenant to pay money to another at a future day; if the covenantee die before the day of payment, the money is not due to his representatives."(*d*)

Similar to, and upon the authority of, the last case, Sir *Joseph Jekyll* determined that of *Jennings* v. *Looks*,(*e*) in which a testator, having two sons named *Richard* and *Thomas*, and being seised in fee of the manor of *Blackacre* (which was in mortgage,) devised 1000*l.* to *Thomas* (then a year old,) *to be paid* to him at twenty-one *out* of that manor: with a power to the executor, by selling timber, to raise money in aid of his personal estate, to pay debts and legacies. *Thomas* died about the age of two years, and *Richard* at the age of six; upon which the manor devolved to the uncle. The question was, whether the administratrix of *Thomas* was entitled to the portion? And the Court decided in the negative, as *Thomas* died before twenty-one, and the portion was payable *only* out of the lands; but Sir *Joseph Jekyll* observed, "that were the legacy chargeable on the personal, as well as the real estate, then so much thereof as the personal fund would extend to pay, should go to the executors or administrators of the child."

Upon the strength of the two last authorities, Lord *King* determined the case of the Duke of *Chandos* v. *Talbot*:(*f*) a case, where both the real and personal funds were charged with the payment of legacies, and resort was necessary to be made to the real estate in aid of the personal.

There Sir *T. Doleman* bequeathed to his nephew *Thomas* 500*l.* *payable* at the age of twenty-five. He also devised his real estates to trustees, charged with the payment of debts and *legacies*. *Thomas*, having survived the testator, died at the age of sixteen. From the state of the real and personal assets, it became necessary for the Court to determine, whether all or what proportion of the 500*l.* was to be paid, regard being had to the circumstance of the legatee not having lived to the age of twenty-five. And the Court decided, that so much of the legacy as was to affect the real estate failed by the death of *Thomas* under twenty-five; and that such part of it as the personal estate was sufficient to answer vested in the legatee, and was transmissible to his personal representative. Lord *King* observed upon this occasion, that there was no difference where the

(*d*) 1 Atk. 486. (*e*) 2 P. Will. 276. (*f*) 2 P. Will. 602. 612.

real as well as the personal estate were charged; for in such case, so far as the executor or administrator claimed out of the latter fund, he should succeed, according to the rule of the Ecclesiastical Court,(*g*) in which those things were determinable, even although the infant legatee died before the time of payment; but that so far as the legacy was charged upon the land, so far should it, upon the legatee dying before the money became payable, sink; a rule, which having of late universally prevailed, whether the legatee were a *child* or a *stranger*, it would be of the most dangerous consequence, and disturb a great deal of property, to break into it."

Lord *Hardwicke* acknowledged the force of these observations on a subsequent occasion. His Lordship said, "he thought it very extraordinary, that when the real estate was only an *auxiliary* fund fund to the personal, it should be chargeable in a different manner, and not be liable to the same rules and determinations as the *primary* security, the personal estate. But he found the resolutions so strong, that there was no difference between a charge on the real estate only, and a charge upon the real and personal property, that he could not make a contrary determination." His Lordship therefore, acted upon the preceding authorities in the following instance:

In *Prowse* v. *Abingdon*,(*h*) Mr. *Compton*, after directing his trustees and executors to sell part of his real estate, towards satisfaction of debts, and to stand seised of the remainder, upon trust, by the means mentioned in his will, to pay all his debts and *legacies*, remainder to the use of Mrs. *Abingdon* for life, &c. gave to his nephew *Thomas Prowse* a legacy of 500*l.* *to be paid* at twenty-one or marriage. *Thomas* never married, and died under twenty-one; and it became necessary to resort to the real fund charged with debts and legacies, for payment of the legacy of 500*l.*, if the administrator of *Thomas* were entitled to receive it, notwithstanding the death of the latter during infancy. But Lord *Hardwicke* was of opinion against the claim, upon the principle, that as *Thomas* died under twenty-one, he did not take a vested interest in the money, so far as concerned the real estate.

In the last case, it was attempted to induce the Court so to *marshal* the real and personal assets as to confine the creditors to the former, in order that sufficient of the latter might be left to answer the legacy; in which event, the administrator of *Thomas* would have been entitled to the money, as being payable out of the *personal* estate. Lord *Hardwicke*, however, was of opinion, that the point so raised could not be maintained; for the rule of thus marshalling the assets only applies, where it is proper to be done, *at the time the legacy first takes place*, and not where it is owing to *a fact* which happens *subsequently to the death of the testator*, and to a mere *accident*, as the death of the legatee before twenty-one.

The next case is an authority that a gift of *interest*, until the legacy become due, will not vest the principal; but that if the legatee die before time of payment, the money will sink into the real estate.

(*g*) See last chapter, sect. 2. (*h*) 1 Atk. 482. and see *Van* v. *Clark*, ibid. 510.

In *Gawler* v. *Standerwicke*,(*i*) at the Rolls, 15 *November* 1787, legacies were given to infants out of lands (charged generally with debts) *payable* at twenty-one, with *interest* at *three per cent.* One of the infants having died before that age, Lord *Kenyon*, after great consideration, decreed, that the legacy of the deceased child was not to be raised.

The last case which we shall cite is *Harrison* v. *Naylor*.(*k*) Mr. *Naylor* bequeathed 5000*l.* to his natural daughter *Elizabeth*, and 3000*l.* to his unborn child, *to be paid* to them respectively at twenty-one; and he directed those legacies to be *collected* and *raised* in the manner and by the *means thereinafter pointed out* and explained. He then ordered his executors to invest his residuary personal estate in *Bank* stock, and to lay it out in the purchase of a freehold estate, which he devised to his natural son as therein mentioned. The testator, after providing out of the rents a maintenance for his children, directed his executors to apply "the residue of the rents and profits of the said estate to the purpose of raising and providing the legacies thereby given to his said natural children; and if the said rents and profits proved insufficient, then he made the estate, so to be purchased, chargeable with the payment thereof." The child, who was unborn at the date of the will, died an infant, to whom administration was obtained by authority of a sign manual. And the question was, whether the administrator was entitled to the 3000*l.* as the legatee died before the time of payment? From the peculiarity of the bequest, Lord *Thurlow* at first doubted whether this was not a mere personal legacy; but he was finally of opinion that it was payable out of land, for such the residuary estate was to be considered. His Lordship observed, that the testator, having *referred* to the manner in which the legacy was to be *raised*, *provided* for the payment of it *out* of his *real* estate; and that the moment the residue ought to be laid out in land, it was to be considered as a real fund, and therefore within the *common rule*.

Such is the general rule in regard to the vesting of legacies or portions *primarily* given out of, or *secondarily* made charges upon, real estate. But Courts of Equity have allowed and established exceptions to it in particular instances; as, when the condition annexed to the legacy or portion had respect to the *circumstances of the estate*, and not to the person of the legatee. In those cases they have considered, that a benefit was at all events intended for the legatee, and that the time of payment alone was deferred, with a view to the convenience of the estate, and not to prevent the legacy from sooner vesting. These exceptions it is proposed to consider under the following title:

Sect. II. When payment of a Legacy or Portion is not postponed on account of the age of the Legatee or Child, but in regard to the convenience of the person, or the circumstances of the estate charged with it.

An instance, where such a postponement of paying a legacy or

(*i*) 1 Bro. C. C. 106. in a note to *Green* v. *Pigot*.
(*k*) 3 Bro. C. C. 108. 2 Cox, 247. *S. C.* and see *Phipps* v. Lord *Mulgrave*, 3 Ves. 613. also *Pearce* v. *Loman*, ibid. 135.

portion will not prevent its vesting, may be thus supposed. If lands be devised to *A.* for life, remainder to *B.* charged with a legacy or portion for *C.* upon the death of *A.*; in this and similar cases, although *C.* happen to die before *A.* yet his personal representative will be entitled to the legacy; because the interest in it is vested in *C.* at the death of the testator, the time of payment being only deferred for the benefit of *A.* until *B.* came into possession of the estate. The real property is not (as in the instances produced in the last section) merely created a fund for the payment of the legacy or portion to *C.* at a future period on account of his age and unfitness to receive it sooner, but the estate is devised in remainder equally for the benefit of *B.* and *C.*; the interests of *B.* and *C.* vest together, for the testator intended to divide the estate between them. *B.* was to take the estate *minus* in value, by so much as the legacy or portion to *C.* amounted to. It will appear from the authorities below stated, that in determining cases according to this distinction, the Court of Chancery has, in several of them, laid particular stress on the fact, that the charge of the legacies upon the land was not merely *equitable* but *legal*, and would have enabled the representatives of the legatee, who died before the time of payment, to recover the money in a Court of Law.

The first case, where a legacy, payable out of the real estate at a future time, was determined to be vested before the arrival of that period, was *King* v. *Withers*,(*l*) in which Mr. *Withers* bequeathed to his daughter *Mary*, at twenty-one or marriage, 2500*l.*, declaring that if his son *Charles* should die without issue male *then* living, or which might be afterwards born, *Mary* should receive an additional sum of 3500*l.* at twenty-one or marriage. But if the contingency of his son's death did not happen before *Mary* attained twenty-one or married, *she was* nevertheless *to be paid the* 3500*l. whenever his son died.* The testator then devised his real estate to his son in tail, remainder to his brother in fee; and *charged* that estate with the payment of the 3500*l.* "whenever it should become due and payable," directing, in case of failure of issue of his son, that *Mary*, her heirs or assigns, should join in a surrender of some copyholds to the use of his brother, or the bequest of the 3500*l.* was to be void. *Mary* having attained twenty-one, died before her brother, who also died without male issue, and the 3500*l.* was claimed by her administrator. The question was, whether the money was to be raised out of the land, the personal estate being deficient? which depended upon this; whether such an interest in it vested in *Mary*, as to be transmissible to her personal representative, although she died before the period when it was made payable? And Lord *Talbot* decreed in the affirmative.

The decree appears to have been founded upon the principle that the time of payment was merely postponed, in favour of *Charles* and his issue, and not in respect of the age or person of his sister, who was to receive the 3500*l.* whenever *Charles* died without issue. The remainder to the brother, and the charge upon it, vested at the same instant. It was as much the intention of the testator that

(*l*) Forrest. 117. Decree affirmed by the house of Lords, 3 Bro. Parl. Ca. 135. 8vo. ed.

Mary should have the 3500*l.*, as that the brother should succeed to the estate; and it clearly appeared that the testator meant to increase his daughter's provision, in the event of *Charles's* death without issue. It is therefore obvious, that this case is an exception, upon sound principle, to the rule stated in the preceding section.

The last case was followed by *Hutchins* v. *Foy*,(*m*) where the testator devised his real and personal estates to *Thomas Beal* for life, remainder to his children, remainder to his sister *Martha*, for life, remainder to *John Beal* for life, and afterwards to his children, with remainder, as to a moiety of the real estate, to the defendant *Foy* in fee, "*paying* out of it, *when it falls* 500*l.*;" 50*l.* of which he gave to *Margaret*, a daughter of his sister *Martha*. *Margaret* died before *Thomas Beal*, and the remainder to *Foy* having come into possession, *Margaret's* administrator claimed the 50*l.*; contending that she took a vested interest in that sum at the death of the devisor, which entitled her personal representative to receive it; and so the Court determined.

The reasons for such decision were these: First, because the remainder to *Foy*, and the 50*l.* out of it, vested immediately upon the demise of the testator; and, secondly, because the estate and the charge upon it passed together, so that the devisee took the estate *cum onere;* for, since it was the testator's intention that *Foy* should have the estate, it was as much his intention that *Foy* should pay the money out of it, when the possession came to him, and the word "*paying*" clearly showed the intent of the testator, that *Foy* should not have the land unless he paid the money.

So in *Lowther* v. *Condon*,(*n*) a case maturely considered by Lord *Hardwicke*, in which Mr. *Condon*, having a son, and also two daughters, *Isabella* and *Diana*, bequeathed to each daughter 500*l.* to be raised and paid out of the rents, or by sale or mortgage of specific lands immediately after his death, together with interest from that period until the legacies were paid to them, "or their respective executors, administrators, or assigns." The testator further gave to each daughter 1000*l.* to be raised and paid "immediately after the decease of his wife," by the means before mentioned, with interest from the wife's death until the money was paid to them, "or their respective executors, administrators, or assigns." And the testator declared, that if either daughter died *before him*, the survivor, her executors, administrators, and assigns, should receive the whole of the legacies; *and in such case, the part of the daughter so dying should not cease, or sink into the estate for the benefit of the heir, but should remain and be raised for the benefit of the surviving daughter.* *Diana*, after surviving the testator, died during the life of her mother, and *Diana's* husband claimed, as her administrator, to have the 1000*l.* raised out of the real estate, the mother being dead; a claim which depended upon this, whether, notwithstanding *Diana* died before her mother, the period when the legacy was to be raised, she took such an interest in it, as was transmissible to her personal representative? And Lord *Hardwicke* decided in the affirmative.

(*m*) Com. Rep. 716. 723. (*n*) 2 Atk. 127.

In pronouncing judgment in the last case, Lord *Hardwicke* adverted to the distinction, before mentioned, where the time of paying a legacy is postponed, in consequence of the *circumstances* of the estate, and not in consequence of the *circumstances* of the *legatee* But it was unnecessary, in the present instance, to rely alone upon that distinction, in order to give vested interests to the daughters; for his Lordship, as he declared, founded his opinion *principally* upon the clause in the will, providing against lapse, if either daughter died before the testator; from which he drew the conclusion, that the testator's having shown so decided an intention to prevent the legacy from sinking into the land, upon the happening of the event just mentioned, afforded a very powerful reason for inferring that he did not mean it to sink into the estate, if the daughters survived him. Lord *Hardwicke* was therefore of opinion, that the clause alluded to afforded a plain indication of the testator's intention, that his daughters should have their legacies at all events, totally independent of the accident of their dying during the life of their mother.

The same Judge made a similar decision in *Emes* v. *Hancock*,(*o*) which in circumstances differs from the preceding authorities stated in this section There Mr. *Hancock* devised his copyhold estate to his wife for life, remainder to his son *Stephen* until his grandson *Thomas* attained the age of twenty-three; at which time he gave the property to *Thomas* in fee, *on condition* that he, his heirs, or assigns, paid or caused to be paid to his grand-daughter *Elizabeth*, 60*l.* *within* two years after his attaining twenty-three; but, if he (*Thomas*) happened to die without issue, then the testator devised the copyhold to his son *Stephen* in fee, *on* condition of paying 100*l.* to *Elizabeth*, *within* one year *after he enjoyed the estate* under the last devise; and upon default in payment by *Stephen* or *Thomas* of the 60*l.* a *right* of *entry* on the estate was given to *Elizabeth*, her *executors* and *administrators*. *Elizabeth*, after surviving the testator, married the plaintiff, and lived till after her brother *Thomas* arrived at the age of twenty-three, but died before the expiration of the two years after *Thomas* attained that age. The question was, whether the plaintiff, *Elizabeth's* personal representative, was entitled to the legacy? And Lord *Hardwicke* determined in his favour.

The case of *King* v. *Withers*, before stated,(*p*) is a direct authority for the vesting of the interest in *Elizabeth*, notwithstanding she did not survive the two years after her brother *Thomas* attained his age of twenty-three. Lord *Hardwicke* observed, "That the testator's appointing two years after *Thomas* attained twenty-three, for raising the 60*l.*, seemed to be done merely *for the convenience of the estate*." But his Lordship chiefly relied upon the title, which *Elizabeth*, and her executors or administrators, had at law, under the will, to recover the money. The devise operated as a conditional limitation;(*q*) and, in default of payment, she or her personal representatives might have entered upon the estate.(*r*) The death of *Elizabeth* within the two years was at law, neither the breach of any condition, nor any excuse for withholding the 60*l.*

(*o*) 2 Atk. 507. (*p*) *Ante*, p. 437. (*q*) See 2 Black. Com. 155. (*r*) 3 Atk. 322.

But the condition for payment of it subsisted after the testator's death, for the breach of which, the plaintiff, as administrator of *Elizabeth*, had a legal remedy. Such being the right of the plaintiff at law to the money, a court of equity would neither deprive him of it, nor refuse to grant relief merely because he had a *legal* title; for the consequence of such refusal would have been, that if the plaintiff obtained a judgment in ejectment, the defendant might have come into equity for a redemption upon payment of the 60*l*; a circuity and multiplication of suits which the Court always avoids.(*s*) For these reasons, Lord *Hardwicke* ordered the money to be raised and paid to the plaintiff.

The next case nearly resembles the last, and is another instance, where the charge on real estate was *legal*, and not merely *equitable*, as in several of the cases.

In *Sherman* v. *Collins*,(*t*) Mr. *Collins* bequeathed to each of his daughters, *Mary* and *Ann*, 300*l*., to be paid to them when his son *John* attained the age of twenty-six, without intermediate interest; and he *charged* the two legacies upon his *real* and *personal* estates, and gave to the legatees a *right of entry* upon the reality, to *hold until* the money, with interest from the time it became due, was paid; and after such payment, he devised the real estate to his son *John* in fee; who attained the age of twenty-six, but *Ann* and *Mary* died *before John* attained that age, they having first arrived at the age of twenty-one. One of them married and left children; the other died unmarried, and bequeathed her legacy to her sister; whose husband and two children claimed both legacies, though each sister died before their brother *John* attained the age of twenty-six. And Lord *Hardwicke* decreed in their favour, notwithstanding it should be necessary to resort to the real estate, in aid of the personal fund, which was first applicable to those demands.

We here observe the uniformity of principle which pervades this and the preceding cases. It is obvious that the time of paying the legacies of 300*l*. was merely postponed, to prevent the burthen of interest falling upon the estate of *John*, until he attained the age of twenty-six. And when the testator had given this *express* reason for the postponement, it would have been a very unnatural construction, to infer that the daughters or their representatives should lose the legacies, because the former happened to die before *John* attained the above age. The legacies, therefore, vested in each daughter, the payment being deferred for the conveniency of the estate, and not in respect of the circumstances of the legatees. Besides the daughters and their personal representatives had the same *legal* title to recover the legacies, as *Elizabeth Hancock* and her representatives, in the case of *Emes* v. *Hancock;* a circumstance upon which Lord *Hardwicke* placed reliance, in pronouncing his judgments in both cases.

The observations that have been made, also apply to the case of *Hodgson* v. *Rawson*,(*u*) in which Mr. *Hollins* devised part of his

(*s*) 3 Atk. 322. (*t*) 3 Atk. 319.
(*u*) 1 Ves. sen. 44. and see *Wilson* v. *Spencer*, stated by Lord *Hardwicke* in this case, ibid. 48. and in 3 P. Will. 172.

real estate to his mother for life, with remainder to *William Rawson* and his heirs, he and they paying out of it *legacies* to several persons; the sums to be paid *within twelve months next after the mother's decease;* and he charged the estate with them accordingly. The mother entered upon the estate, and a month after her death, *B.* a legatee of 100*l.* died, whose personal representatives claimed the money, although *B.* did not survive the mother a *twelve month;* the period appointed for its payment. Yet Lord *Hardwicke* determined that they were entitled to the legacy; 1st, because the estate was liable at law to the payment of the legacies; the devise to *William* being a condition, of which, if broken, the testator's heir might take advantage by entry, but who would hold the estate under the charge in the will, subject to the legacies; 2dly, because the remainder and the charge upon it vested at one and the same instant, it having been equally the intention of the testator, that the legacies should be paid, as that the remainder-man should have the estate; and lastly, because the postponement of paying the legacies, till twelve months after the mother's death, was not intended to suspend the vesting, but merely as an allowance of a reasonable time to the devisee in remainder, after the estate came into possession, to make the payments charged upon it.

Similar to the last case is *Tunstall* v. *Brachen*,(*x*) where the testator devised an estate to one of his sisters and co-heiresses, *paying* 100*l.* a year to his wife for life, and *within twelve months after the wife's death* to pay several legacies. Some of the legatees who survived the testator, died before his wife; and Lord *Hardwicke* held that they took vested interests, which entitled their personal representatives to payment of the money; upon the principle, that the time of payment was only deferred for the convenience of the estate, and that the rights of the legatees were not merely equitable, but available *at law.*

So in *Embrey* v. *Martin*,(*y*) Mr. *Neabon* devised his freehold estates to his son *John* in tail, remainder to his daughter *Prudence* in tail, remainder to his daughter *Elizabeth* for life, remainder to her son *John Trigg* in fee, upon *condition* that he paid to his sister Mrs. *Embrey*, 100*l. at or soon after his being possessed of the premises;* and for non-payment, the estates should be to Mrs. *Embrey*, &c. *John*, *Prudence*, and *Elizabeth*, being dead; Mrs. *Embrey* died, but, during the life of one of the persons last named; and the remainder in fee in the testator's estate having become vested in possession, the question was, whether, as Mrs. *Embrey* died before the legacy was payable, the plaintiff, as her executor, was entitled to have it raised out of the real estates devised in remainder to *John Trigg?* and Lord *Hardwicke* determined in the affirmative.

It is observable in the last case, that payment of the legacy was merely postponed until the devisee came *into possession* of the estate charged with it. The conveniency of the devisee was the sole motive for deferring the raising of the money, which was intended by the testator to be received by the legatee or his personal representatives, whenever the remainder-man became possessed of the fund out of which it was to be paid. Similar to the four preceding

(*x*) Ambl. 167. more fully reported 1 Bro. C. C. 124. in a note. (*y*) Ambl. 230.

cases, the legatee or her personal representatives, in the last, were entitled to the money *at law;* the devise operating as a conditional limitation,(*z*) which, in default of the money being paid when due, authorized the legatee or her representatives to enter upon the estate. Lord *Hardwicke* therefore, in ordering the 100*l.* to be paid to the executor of the legatee, acted in conformity with prior authorities; which were acknowledged and followed by Lord *Camden* in the case of—

Manning v. *Herbert*,(*a*) where the testator, being entitled to a farm let to a Mr. *Taylor*, also to a dwelling house, and to great and small tithes of little value, devised to his wife, his house and the lands belonging to it, together with his estate in the occupation of Mr. *Taylor*, directing that when his son *William* attained twenty-one, his wife should pay to *William* 40*l.* a year *out* of the lands in *Taylor's* occupation. He then gave to his daughters *Jane* and *Elizabeth*, the great and small tithes, and expressed his will to be, that *six months after his wife's death William should pay out of the estate* which was then in the occupation of Mr. *Taylor*, 600*l.* to *Jane* and *Elizabeth* in equal shares; and in so doing the testator gave the whole of his real estate to *William* in fee; but if either *Jane* or *Elizabeth* died before the wife, the survivor was to have the tithes, and only 400*l.* out of *Taylor's* lands; and in case of non-payment, a *right* of *entry* on those lands was given to both or either of the daughters. *Jane* survived *Elizabeth*, but both died *before* the wife; and *Jane's* administrator claimed the 400*l.* which was resisted on the ground, that, as she died before the money was payable, it sunk into the estate. But Lord *Camden* was of a different opinion, and ordered the legacy to be paid to the administrator of *Jane*.

The foundation of Lord *Camden's* decree was, that the legacies not being made payable during the life of the wife, was merely for her benefit; and that the six months after her death was allowed for the convenience of *William;* in order to enable him to raise the money, within a reasonable time, after he had obtained possession of the estate. All which circumstances showed it to have been the testator's intention, that the surviving daughter or her personal representative was to receive the 400*l.* at all events. In addition to this, the titles of *Jane* and her administrator were not merely *equitable* but *legal;* a fact, to which Lord *Camden* (as we have seen Lord *Hardwicke* to have previously done) attached considerable importance.

In *Jeal* v. *Tichener*,(*b*) Lord *Apsley* made a like decree, referring to the cases of *Hutchins* v. *Foy*, and *Hodgson* v. *Rawson* before stated.(*c*) Mr. *Shove* devised two houses to his wife for life, remainder to the defendant *Tichener* in fee, he *paying thereout* to *Henry* and *Thomas Thornton* 20*l.* a piece *within three months after the death of his wife*. The two legatees, having survived the testator, died before the wife, but she being dead, and *Tichener* in possession of the houses, the personal representatives of the legatees claimed the legacies bequeathed to them. And Lord *Apsley* declared, that the money vested in the legatees, so as to be transmissible to their

(*z*) 2 Black. Com. 155.
(*a*) Ambl. 575.
(*b*) 1 Bro. C. C. 120. in a note. Ambl. 703. *S. C.*
(*c*) *Ante*, pp. 438. 440.

personal representatives, and was a *charge* upon the houses devised to *Tichener*.

These cases were followed by Lord *Bathurst* in *Clarke* v. *Ross*,(*d*) in which Mr. *Mason* devised his real estates to *Joseph Mason* for life, remainder to his first and other sons in tail, &c. with remainder in fee to *Alexander Wilson;* declaring that if *Alexander* or his heirs should actually come into *possession* of the estates, under the limitations in the will, he or they should pay to his daughter *Catherine Wilson*, 2000*l.* (with which sum the testator *charged* the estates,) *to be paid at the expiration of two years, next after Alexander or his heirs should come into possession. Catherine* married, but died several years before the remainder to *Alexander* came into possession; and the question was, whether she took such a vested interest in the 2000*l.* although she died before the money was payable, as to entitle the person claiming under her personal representative? And Lord *Bathurst* was of opinion, that the interest, did vest in *Catherine*, and he ordered the legacy to be raised, with interest, from the end of two years after the remainder in *Alexander* vested in possession.

So in *Kemp* v. *Davy*,(*e*) Mr. *Kemp* charged his real estates with debts, legacies, and annuities, and devised his real and personal property to trustees to discharge them. After giving several legacies and annuities, among which were legacies to his wife and to his sisters *Jane Blois* and *Elizabeth Kemp*, he ordered his trustees, if his nephew *John Kemp* attained twenty-one, to convey the trust funds to him in fee, subject to the subsisting debts, legacies and annuities; but if his nephew died under that age, he (the testator) gave *additional* legacies to his wife, to *Jane Blois* and to *Elizabeth Kemp*, directing them *to be paid within six months after his nephew's death under twenty-one;* and he devised his real and personal estates to *Mary Kemp*, &c. *John Kemp*, the divisee, died under age, but survived the widow, and *Jane Blois* and *Elizabeth Kemp*. The question was, whether, as the last three persons died before *John*, their personal representatives were entitled to the *additional* legacies? And the Court declared that the three legatees took vested interests, which were transmitted to their personal representatives.

We perceive that all the authorities which have been stated are uniform in establishing the proposition, that where a legacy is given out of a particular fund, with reference to the period when the fund shall vest *in possession*, as for instance, when an estate is devised in remainder to *B.* with a charge to *C.;* the gift amounts to a distribution of the estate between *B.* and *C.* Since therefore the remainder to *B.* vests immediately, so does the charge for *C.* The cases also next referred to, were all decided upon this principle, and *in exception* to the rule mentioned in the beginning of the chapter; a rule which, though at first *universally* adopted,(*f*) was afterwards considered to be very objectionable; and in consequence was devised

(*d*) 2 Dick. 529. 1 Bro. C. C: 120. *in notis.* (*e*) 1 Bro. C. C. 120. *in notis.*

(*f*) Among the cases determined according to the general rule, and which seem to be inconsistent with later authorities, are *Tournay* v. *Tournay*, Pre. Ch. 290. *Carter* v. *Bletsoe*, 2 Vern, 617. *Gordon* v. *Raynes*, 3 P. Will. 134. *Bradley* v. *Powell*, Forrest. 193. *Boycot* v. *Cotton*, 1 Atk. 552. *Hall* v. *Terry*, ibid. 502. and *Att. Gen.* v. *Milner*, 3 Atk. 112.

the exception we have been discussing, where the time of payment referred, not to the *person* of the legatee, but to the *circumstances* of the estate.(*g*)

In *Pawsey* v. *Edgar*,(*h*) the testator devised his real estate to his wife for life, remainder to his son *Robert* in tail male, with remainder to his own right heirs; *upon condition* that *Robert*, or the persons then in possession of the estate, should *within six months after the death of the wife, pay* to his two daughters, *Mary* and *Temperance*, 600*l.* a piece, and interest from the wife's decease, with a *right of entry* in default of payment. And although the daughters died before the wife, after surviving the testator, Lord *Bathurst* determined that they took vested interests, which entitled their personal representatives to the legacies.

Lord *Northington* pronounced a similar degree in *Thompson* v. *Dow*,(*i*) where the testator, being seised of a reversion in an estate expectant upon the death of his aunt, devised the lands to his wife for life, remainder to *Dow* in fee; subject to the payment of 200*l.* to his daughter *Elizabeth six months after his wife's death*, with a *right of entry* in default of payment. Notwithstanding *Elizabeth* died before the wife and aunt, his Lordship held that she took a vested interest transmissible to her personal representative.

These cases were followed by the Court of *Exchequer* in *Morgan* v. *Gardiner*,(*k*) in which Mr. *Price* devised his real estate to his wife for life, remainder to his daughter *Mary* in fee, *charged* with 400*l.* to his four younger daughters, *within one year after the death of his wife*, with interest from her decease. Two of the younger daughters died before the wife, *unmarried*. *Mary* too, the devisee of the estate, died during the life of the wife; and it was determined, that the legacies vested in the younger daughters, which entitled the personal representatives of those who were dead, to their proportions of the fund.

It is observable, that the last case differs from the preceding authorities, in the circumstance of the devisee in remainder having died before the determination of the particular estate. This event, however, was immaterial, for *Mary*, the devisee took a vested interest in the lands liable to the legacies, and which she must have paid had she survived the tenant for life. The person therefore claiming under her, who in this instance was her heir, necessarily succeeded to the estate, subject to all the claims to which it would have been liable in the hands of Mary, had she survived the tenant for life, when the remainder would have vested in possession. In truth, the charge was a lien upon the estate, which it would be bound to answer, into whose hands soever it went.

In *Dawson* v. *Killett*,(*l*) a case of frequent reference, the principle of the authorities before stated was considered and acknowledged. Mr. *Mitchell* devised an estate to his wife for life, and if they should have no issue, he gave the estate to the defendant *Killet*, *charged* with 100*l.* to *William Ransçomb*, and 100*l.* to *Martha Ball*, to be *paid in six months after the death of his wife*. *Martha* having died before the testator, he, by a codicil, gave 50*l.* of her

(*g*) 1 Bro. C. C. 123. (*h*) Ibid. 192. *in notis*. (*i*) Ibid. 193. *in notis*.
(*k*) 1 Bro. C. C. 194. *in notis*. (*l*) 1 Bro. C. C. 119.

legacy to *Ranscomb*, and the remainder of it to a Mr. *Beaumont*, to be paid at the time *Martha* would have been entitled to receive the legacy, had she lived. *Ranscomb*, after surviving the testator, died *before* the wife, and the wife being dead, *Ranscomb's* executors claimed the legacies of 150*l.*; and Lord *Thurlow* was of opinion that they were entitled to them; and said, "the devise was, after the death of the wife, to *Killet*, and the testator *charged* the estate of *Killet* (meaning the *interest* of *Killet* in the estate) with the sums in question, which *distributes* the estate between *Killet* and the legatees. Upon the death of the testator, the remainder vested in *Killet*, and the moment it vested in him, the charges vested in those to whom they were given." His Lordship therefore ordered the 150*l.* to be raised, with interest to be computed from six months after the death of the wife.

A similar question came before his Lordship in *Godwin* v. *Munday*,(*m*) when he pronounced the like decree as in the last case. And in *Walker* v. *Main*, (*n*) the testator devised real property to his wife for life, remainder to the plaintiff, in trust to sell and distribute the proceeds among his children and grand-children, at twenty-one, or marriage, with benefit of survivorship, in the event of any dying before their shares became *payable*.(*o*) A child and a grandchild, after attaining twenty-one and marrying, died *before* the widow; and their shares of the real produce were claimed by their personal representatives. And Sir *Thomas Plumer*, M. R., decided in their favour.

We may here lastly notice the case of *Watkins* v. *Cheek*,(*p*) wherein a legacy charged upon real and personal estate was given to a legatee, *to vest immediately upon the death of the testator*, but to be paid to the legatee on attaining twenty-one, with interest in the meantime for maintenance. The legatee died under twenty-one. And it was held by Sir *John Leach*, V. C., that the safest construction was, that the testator meant to express, that the legacy should not sink for the benefit of the devisee of the land, if the legatee should die under twenty-one.

CHAPTER XII.

Of charging Legacies upon the Real Estate, and of Exoneration.

HAVING, in the preceding chapter, marked the distinctions as to the vesting of legacies, when they were made payable out of the personal estate only, or out of the real estate, either alone or in conjunction with the personal property; it is proposed to consider, in the present chapter, FIRST, when legacies will be construed as given solely out of the real estate; SECONDLY, when that estate is to be considered *charged* only with their payment; and LASTLY, as to the

(*m*) 1 Bro. C. C. 191 and see *Bayley* v. *Bishop*, 9 Ves. 6. stated *ante*, p. 428.
(*n*) 1 Jac. & Walk. 1. 7.
(*o*) See *ante*, p. 418.
(*p*) 2 Sim. & Stu. 199.

application of those funds in satisfaction of the legacies. In treating of these matters, the following arrangement is adopted:

Sect. I. When Legacies are given solely out of the Real Estate.

Sect. II. When Legacies will, and will not, be considered effectual charges upon the Real Estate. And—

1.—*Where the legacies were held to be charges on the real property.*

2—*When not so considered.*

3.—*Of charging and disposing of the real estate, or its produce, by codicils or paper-writings not attested according to the Statute of Frauds.*

Sect. III. Of Exoneration.

1.—*When the* personal *estate is first liable to pay debts and legacies.*

2—*When the* real *estate will be considered the primary fund for those purposes.*

3.—*As to the admission of* parol evidence *of the testator's intention.*

4.—*When the personal estate is exonerated from* particular *debts and legacies, and not from debts and legacies generally.*

5.—*When the personal estate is not exonerated from paticular debts and legacies—*

And as to debts not of the testator's own contracting.

6.—*Where a* part *of the personal estate is specifically appropriated to pay legacies in exoneration of the remainder.*

7.—*As to the exemption of the personal estate from payment of debts and legacies, where the legatee dies before the testator.*

8.—*With respect to the liability of the real estate to debts and legacies, when the money has been* once *raised, but misapplied*

Sect. I. When Legacies are given solely out of the Real Estate.

Where, from the terms of the will, it clearly appears to have been the testator's intention, that the fund for the payment of legacies given out of, or made charges upon, the real estate, is that estate only and singly; it alone will be liable to those demands.

This may happen in the following instances;—as if legacies be given, and at the *same time* directed to be paid out of the real property;(*a*) or where the real estate is given to *A.* either *in præsenti* or

(*a*) *Amesbury* v. *Brown*, 1 Ves. sen. 482.

in futuro, he paying out of it certain legacies ;(*b*) or if the land be *charged* with such payments :(*c*) in each case, the devised estate will be the only fund out of which those sums are to be paid. The reasons are these ; the estate in the one case is expressly encumbered, and in the other it is intended to be divided between the devisee and legatees. In the last instance, the estate is given upon condition that the devisee make the specific payments. He takes the land *cum onere*, and *non constat* the estate would have been devised to him, unless the testator had conceived that the legacies would have been discharged out of it.

So also, where a legacy is given out of real property, not the absolute estate of the testator, but in the exercise of a *power* of appointment, that property is the only fund liable to the bequest ;(*d*) except the appointor manifest in his will an intention (as in *Savile* v. *Blacket* before stated,)(*e*) that, in failure of the specific estate, his own should be subject to the legacy.

The real estate will also be the only fund for payment, when it is given to trustees in trust out of,(*f*) or to apply the rents and profits, or the produce from a sale or mortgage, of the property, in paying particular sums of money ; because these sums have not, like debts, any existence independent of the will which bequeaths them as *specific* parts of the particular fund referred to ; and out of which alone they are given and payable.(*g*) Instances of this kind have been produced in the third chapter, which treats of specific legacies.(*h*)

A distinction, indeed, must be noticed between the devise of lands to a person *charged* with, or with a direction to pay, *particular* sums of money ; or to trustees, in trust to raise and pay *particular* sums ; and when the charge or trust is for satisfaction of debts or legacies *generally*. In instances of the first kind, we have seen that the real estate is solely liable to the demands ; but in instances of the second description, the real will be only answerable in aid of the personal estate, which is the primary and natural fund appointed by law to pay debts and legacies. Suppose, then, a devise of lands to *B.*, *charged* with, or he *paying* all debts and legacies ;(*i*) or a devise to trustees, to pay debts and legacies, remainder to *C.* ; in each instance, the primary fund applicable to those demands is the general personal estate, as will be shown in the third section.

But when the real estate is not expressly charged with debts and

(*b*) *Hutchins* v. *Foy*, *ante*, p. 438. *Jennings* v. *Looks*, *ante*, p. 434. *Lowther* v. *Condon*, *ante*, p. 438. *Emes* v. *Hancock*, *ante*, p 439. *Hodgson* v. *Rawson*, *ante*, p. 440. *Tunstall* v. *Brachen*, *ante*, p. 441. *Embrey*, v. *Martin*, *ante*, p. 441. *Manning* v. *Herbert*, *ante*, p. 442. *Jeal* v. *Tichener*. *ante*, p. 442. *Pawsey* v. *Edgar*, *ante*, p. 444. *Thompson* v. *Dow*, *ante*, 444. *Morgan* v. *Gardiner*, *ante*, p. 444. *Dawson* v. *Killet*, *ante*, p. 444. *Godwin* v. *Munday*, 1 Bro. C. C. 391. *Walker* v. *Main*, 1 Jac. & Walk. 1-7.

(*c*) *Clarke* v. *Ross*, *ante*, 443. and sec. 1 Ves. & Bea. 276. and *ante*, sect. 1. Chap. IX. also, *Gittins* v. *Steel*, 1 Swanst. 24. stated *infra*, and *Morgan* v. *Gardiner*, *ante*, p. 444.

(*d*) *Pawlett* v. *Pawlett*, *ante*, p. 432. *Phipps* v. Lord *Mulgrave*, 3 Ves. 613.

(*e*) Chap. III. sect. 3. p. 153. (*f*) *Hartley* v. *Hurle*, 5 Ves. 540. stated *infra*.

(*g*) By Sir *W. Grant* in *Brydges* v. *Phillips*, 6 Ves. 571. and by Lord *Eldon* in *Gittins* v. *Steele*, 1 Swanst. 29. *Spurway* v. *Glynn*, 9 Ves. 483. stated *infra*. *Hancox* v. *Abbay*. 11 Ves. 179. 185. 186. stated *infra*.

(*h*) See the whole of sect. 3. Chap. III. p. 151. and *infra*, sect. 3. sub-div. 4.

(*i*) Ambl. 38. *Mead* v. *Hide*, 2 Vern. 120. *Lovel* v. *Lancaster*, ibid. 183. *Gower* v. *Mead*, Pre. Ch. 2. *Bridgman* v. *Dove*, 3 Atk. 201. *Bromhale* v. *Willbraham*, cited Forrest. 204.

legacies, or with legacies, and the fact of charge or no charge is to be inferred from an interpretation of the contents of the will, the construction in those cases has been attended with considerable nicety. We shall therefore proceed to examine—

Sect. II. When Legacies will, and will not, be considered as effectual charges upon the Real Estate, in the absence of express declaration to that effect.

Heirs have always been looked upon with favour by courts of justice, which have established a general rule of construction to their advantage; *viz.* "that plain words are required to disinherit them."(*k*) Such being the general rule, words equally plain, or indicating a violent presumption of intention, are necessary to create legal or equitable charges upon their estates. However, *general introductory or prefatory words* will have that effect in favour of *creditors*,(*l*) except the extent of the expressions be qualified, as in this manner: "I direct that all my just debts and funeral expenses be paid by my *executors*;" and the real estate be specifically devised.(*m*) But in dubious cases, a court of equity will incline in favour of a charge for the benefit of *creditors*,(*n*) subjecting to it not only the freehold property of which the testator was seised, but also his *copyhold*.(*o*) Whether the same expressions, which would inferentially create a charge of debts upon the real estate, will have the like effect in relation to legacies, is a subject on which there has been a difference of opinion. We shall therefore consider—

1. Instances where legacies were held to be charged upon the real estate under a fair construction of the will.

In *Tompkins* v. *Tompkins*,(*p*) it was determined, that the words "*after* debts and *legacies* paid," connected with the manner of giving the legacies and the real estate, were sufficient to charge the legacies on that fund. The word *after* occurs in many of the cases, yet not in the sense of an adverb of time, but in the sense of "subject" or "liable."(*q*)

In *Tompkins* v. *Tompkins*, Mr. *Tompkins* bequeathed to his daughter *B.*, and two other daughters, 500*l.* each; to be paid at their respective ages of twenty-one, or days of marriage, *out of his stock*. He then devised the *rents* of his real estates to his wife for life, in lieu of dower, for the support and education of his children, and raising and making up the portions of daughters, and proceeded thus: "*after* my debts and legacies paid, I give and devise all

(*k*) 2 P. Will. 188.

(*l*) *Bowdler* v. *Smith*, Pre. Ch. 264. *Webb* v. *Webb*, Barnard. Rep. 89. *Hatton* v. *Nichol*, Forrest 110. *Harris* v. *Ingledew*, 3 P. Will. 91. 96. *King* v. *King*, ibid. 359. *Legh* v. *Warrington*, 1 Bro. Parl. Ca. 511. 8vo. ed. *Beachcroft* v. *Beachcroft*, 2 Vern. 690. *Stanger* v. *Tryon*, and *Kay* v. *Townsend*, 2 Vern. 709. ed. by Raithby, in notes. *Godolphin* v. *Penneck*, 2 Ves. sen. 271. *Thomas* v. *Britnell*, ibid. 313. *Clark* v. *Sewell*, 3 Atk. 100. *Williams* v. *Chitty*, 3 Ves. 552. *Shallcross* v. *Finden*, ibid. 739. See also *Clifford* v. *Lewis*, 6 Mod. 33. and the cases there cited.

(*m*) *Davis* v. *Gardiner*, 2 P. Will. 187. *Bridges* v. *Landen*, stated 3 Ves. 550. *Keeling* v. *Brown*, 5 Ves. 359. *Powell* v. *Robins*, 7 Ves. 209.

(*n*) 2 Ves. & Bea. 273. *Kidney* v. *Coussmaker*, 1 Ves. jun. 436. 7 Bro. Parl. Ca. 573. 8vo. ed. *S. C.* 2 Ves. jun. 267.

(*o*) *Coombes* v. *Gibson*, 1 Bro. C. C. 273. *Kentish* v. *Kentish*, 3 Bro. C. C. 257.

(*p*) Pre. Ch. 397. (*q*) See *Batson* v. *Lindegreen*, 2 Bro. C. C. 94.

my land, tenements and hereditaments, to my son *C.* and his heirs." The wife and son were appointed executors. At the testator's death, his personal estate amounted to no more than 100*l.* The wife entered upon the real estates, and two of her daughters, on marriage, received their portions. The wife died, and *B.*, the remaining daughter, sought to have her portion raised out of the lands; which was resisted by *C.*, contending that the portion was only payable out of the *rents* which accrued during the wife's life. But the Court was of opinion, that *in this case C.'s* estate was liable to the demand; as the several gradations in the will, showed the portions were in all events to be made good to the daughters. The testator, therefore, *first* charged the portions on his *stock*, and *secondly* directed that they should be made good out of the surplus of his rents, during the life of his wife; and *lastly* he devised the lands to *C.*, *subject* to them, in giving the estates to him *after* his debts and *legacies* paid; which, the Court said, in a will, amounted to a charge on the lands; because *C.* was not to have them before the legacies were satisfied.

So in *Trott* v. *Vernon*,(*r*) the words were, "*Imprimis*, I will and *devise* that all my debts, legacies and funerals shall be paid and satisfied in the first place. *Item*, I give and *devise*," &c. The testator then proceeded to dspose of his real and personal estates, and the decision was in favour of the charge upon those words; the Court, as in *Hassell* v. *Hassell*, below stated, laying considerable stress upon the word "devise" being applied, as well to the charge of debts and legacies, as to the disposition of the real estate.

Also in *Awbrey* v. *Middleton*,(*s*) the will began, "as to *all my worldly estate*, I give and dispose thereof in the manner following." Then the testator gave general legacies, and several annuities for lives, to be paid by his executor, and he devised the *rest* and *residue* of his goods, chattels, and *estates* to his nephew, *Mr. Middleton* (who was his *heir*,) appointing him executor. The question was, whether the real estate was well charged with the legacies and annuities, in aid of the personal fund. And Lord *Cowper* determined in the affirmative.

His Lordship's decree was founded upon these reasons; first, because it appeared from the introduction to the will, that the testator intended to dispōse of all his estate, both real and personal. And secondly, that, in making the disposition, he did it in a way, which showed his meaning that both funds should be liable to the legacies and annuities; for, having set out in his will by declaring that he intended to dispose of his worldly substance *in manner following*, &c. and immediately proceeding to give legacies and annuities, and then concluding with a devise of the residue of both funds to his *heir* and *sole executor*, it was obvious that the term "residue," connected with the introductory clause, the intermediate gifts of legacies and annuities, and the relationship of the devisee, who was also sole executor, showed distinctly that the nephew, in the characters of residuary devisee and legatee, was intended to take neither the

(*r*) Prec. Ch. 430. 2 Vern. 708. *S. C.* and see 2 Ves. jun. 331.
(*s*) 4 Vin. Abr. 460. pl. 15. 2 Eq. Ca. Abr. 497. pl. 16. *S. C.*

one estate nor the other, until those legacies and annuities were satisfied.

Upon the principle of the last, was decided the case of *Alcock* v. *Sparhawk*,(*t*) in which the testator began his will in these words: "As touching my worldly goods, I dispose thereof as follows," &c. He then devised his real estate, to his *heir* in fee, gave several legacies, and appointed his *heir* sole *executor*, with a *direction to perform his will*.(*u*) It was adjudged, that such devise, and such direction amounted to a sufficient manifestation of the testator's intention to charge the real estate *devised* to his *heir* with the payment of legacies.

The following case appears to have been determined upon the abstract principle, that were the real estate is combined with the personal, *i. e.* where they are made to constitute one entire fund, the former will be liable to all the burthens of the latter,(*x*) and be charged with debts and legacies.

Thus in *Bench* v. *Biles*,(*y*) Mr. *Hampton* devised and bequeathed all his real and personal estates to his wife for life, blending them into one fund, for her use. After her death he gave general legacies, and the remainder of his real and personal estates to his two nephews. It was declared that the legacies were charges upon the real property.

In the next authority, although Lord *Thurlow's* judgment fluctuated, yet he finally determined in favour of the charge.

The case alluded to is *Minor* v. *Wicksteed*,(*z*) where the testator after charging his personal estate, not specifically bequeathed, with debts and funeral expenses, gave specific parts of it to his wife absolutely, with a legacy of twenty guineas. He also gave to her other articles of personalty for life, exempt from funeral expenses and legacies, remainder to his wife's niece, *Felicia*, for life, and after the death of the survivor, the articles were to fall into the residue. He then gave a legacy of five guineas, and devised his real estates to his wife for life, remainder to *Felicia* for life, with remainder to *John Wicksteed* in fee; "subject (as to the last remainder) and charged with the payment of such debts, funeral expenses and legacies, as that part of his personal estate, which was therein made liable thereto, should not reach to pay." The testator, after charging his personal estate with a small annuity, directed his executors (one of whom was Mr. *Wicksteed*) to place at interest the *surplus* of his personal estate, after payment of his debts and legacies aforesaid, funeral and other expenses incident to his will, in trust for his wife for life, remainder to *Felicia* for life, and after the death of the survivor, he bequeathed the surplus as follows: First, he gave four legacies payable in six months after the death of the surviving tenant for life: and secondly, he gave the residue of it, after payment of the legacies before bequeathed, to Mr. *Wicksteed*. The personal estate being deficient to answer debts, &c. the question was, whether the real estate was charged with the *four*

(*t*) 2 Vern. 228. ed. by Raithby. (*u*) *Cary* v. *Cary*, 2 Scho. & Lefroy. 188.
(*x*) 1 Ves. jun. 444.
(*y*) 4 Mad. 187. and see *Kidney* v *Coussmaker*, 1 Ves. jun. 436. 2 Ves. jun. 267.
(*z*) 3 Bro. C. C. 627.

legacies? If, as Lord *Thurlow* at first thought, these legacies were given as parts of a *supposed residue* of *personal* property, the real estate would not have been liable. But his Lordship was finally of opinion, that the bequest to *Wicksteed* was alone residue. The legacies therefore being *particular*, he considered them to be well charged upon the real estate by the will, in aid of the personal fund. And it seems clear from the context, that Mr. *Wicksteed*, who was both residuary devisee and legatee, and an executor, should not derive any advantage from either estate until the legacies were satisfied.

It seems, that parol evidence of the testator's intention to create a charge upon the lands was given in the last case. Such evidence, however, does not appear to have been acted upon by the Court. And if, as it has been determined by a variety of authorities, a testator's intention is to be alone collected from the contents of his will, parol evidence is inadmissible in the present instance.

Hassel v. *Hassel*,(*a*) bears a very near resemblance to the case of *Aubrey* v. *Middleton*, before stated; and the observations made upon the latter, equally apply to the former. There the testator began his will in this manner: "As touching and concerning my worldly estate, I give, *devise*, and bequeath as follows: first, I give my household goods, &c. to my wife for life; I give, *devise*, and bequeath to my daughter, *Frances*, 300*l.* at twenty-one." and after giving, *devising* and bequeathing other legacies, the testator thus proceeded: "I give, devise, and bequeath to my son, *Halford*, all and singular my real and personal estates, *not herein* disposed, to him, his heirs and assigns." It was contended on behalf of the legatees, that the testator having expressly declared his intention to dispose of *all* his worldly estate, and used in the gifts of the legacies to his children, the word "devise," which was applicable to *real* estate only, and having, by the *residuary* clause, given, *devised*, and bequeathed all his *real* and personal estates, not therein-before disposed of; and having also directed the legacies to be paid by his *executor*, *to whom* he had given his real estate, it was manifestly his intent and meaning to charge the legacies upon that estate. And Lord *Bathurst* was of the same opinion, and so decreed.

So in *Austen* v. *Halsey*,(*b*) Lord *Eldon* laid hold of the circumstance of the savings and accumulations of real and personal estates being charged with legacies, in *one event* which did not happen, to extend the charge on the real savings and accumulations in another which did happen.

In the case just referred to, Mr. *Austen* bequeathed some legacies and portions to his daughters, *Frances* and *Elizabeth*, if they attained twenty-one, with benefit of survivorship upon either of them dying under that age; directing his trustees to allow them a proper *maintenance* out of the *rents* and interest of his real and personal property. He then devised to the trustees his real and personal estates, to convey and assign to his son *Henry*, absolutely, at twenty-one or upon marriage with consent, or in strict settlement, if he married under twenty-one without consent; and in default of issue, or if the son died under twenty-one, without ever having been mar-

(*a*) 2 Dick. 527. (*b*) 6 Ves. 475.

ried, remainder to *Frances* absolutely, in case she attained twenty-three or married with consent, or in strict settlement, if she married under that age without consent; and in default of issue, or upon marriage without consent under twenty-three, remainder to his sister *Elizabeth*, for the like interests as were devised to *Frances*, &c. And the testator directed his trustees, *in the event of his son's death under twenty-one*, or *his marriage sooner without consent*, to convey his leasehold and personal estates, with all the *savings* and *accumulations*, which should be made from the produce of his *real* and personal property, *after payment of legacies*, &c. to his two daughters in equal shares, to be vested interests and delivered to them at their ages of twenty-three, or upon their previous marriages with consent, with benefit of survivorship; and if neither of them attained twenty-three, nor previously married with consent, he gave the whole savings and accumulations to the persons who, at the survivor's death, should be entitled to the possession of the real estates. Before the son attained the age of twenty-one or married, his sisters, also minors, applied to the Court of Chancery to have their legacies raised and secured; and, the personal fund being deficient, the question was, whether the savings and accumulations of the *rents* during the son's minority, were charged with the legacies? since the only charge expressed in the will was upon the son's dying under twenty-one, or his marrying without consent, neither of which events had happened. And Lord *Eldon* was of opinion, upon the intention appearing from the whole of the will, that the testator meant the savings and accumulations to be charged in the event that had happened; although the words "after payment of legacies" were not in the clause giving the savings to the son, as in the clause giving them to the daughters. And his Lordship inferred from the limitation over of the personal fund, *with* the savings and accumulations from it, and the real estate if his daughters died before they were entitled to receive them, that the testator intended *whoever* took the fund, should do so subject to the legacies.

Closely allied in principle to the last authority is the case of *Webb* v. *Webb*,(c) in which *General Webb* charged his real estates with the payment of two annuities, the one to his eldest son *Edmund*, and the other to *Edmund's* wife, after his death. The testator then appointed his manors of *H.* to his second son *Borlase*, in strict settlement, and devised all his *other* real estates (of which he had none) together with his personal estate, to *Borlase* absolutely, charged with debts and *legacies;* which devise was immediately followed by the bequests of *portions* to his other younger children, to be vested at twenty-one or marriage, and paid within two years after the testator's death; the intermediate *interest* to be *paid by Borlase*. And it was declared, that if any younger child died before the portion became vested, or married, during his life, the same should sink for the benefit of *Borlase*. The testator, not having any other real estate than the manors of *H.* which were not expressly charged with the portions, the question was, whether those manors were *by implication* charged with them. And *Parker*, C. J. determined in the affirmative, who considered the younger children as *creditors*, and

(c) Barnard. Rep. 86.

said, that where a testator in the beginning of his will declared, that he was disposing of all his worldly estate, and then gave direction that his debts should be paid, the debts became a charge upon the real as well as the personal estate.

In the last case it was objected to the charge, that the testator having used proper words to subject the real fund to the payment of the annuities, it was to be inferred, that, as he omitted them in regard to the portions, his meaning was not the same; but the Court answered, that a testator might use express words of charge in one part of his will, and create a charge by implication in another. An implication which seems to be clearer in the present case than in *Austen* v. *Halsey* before stated; for in this instance, although the settled estates were not expressly charged with the portions, as the testator's other estates would have been, had he possessed any, yet it clearly appeared from the clauses which directed *Borlase*, the devisee of the settled estates, to pay interest upon the portions, and provided for the *sinking* of the portions of children dying before taking vested interests for the benefit of *Borlase*, that the testator intended to charge as well the settled as his other real estates with their payment.

We may here observe, that where a testator charges *all* his real estates with the payment of his legacies, all will be equally liable to contribute; no preference being allowed to the estates *particularly* devised over those comprehended in the *residuary* devise, since all devises of real estates, whether particular or residuary, are equally *specific*. This was decided in the recent case of *Spong* v. *Spong*,(*d*) where an attempt was made to establish a preference in favour of the former class of estates, in analogy to the case of a *specific* legacy, which is not subject to contribution with the *general* legacies, where there is a deficiency of assets. From this decree of the Lord Chief Baron, the defendant *Spong* has appealed to the House of Lords.

But the real estate may be generally charged with debts and legacies, with an exception of a particular interest limited in the whole or in part of it, when the intention is clear in favour of the exemption.

Thus in *Birmingham* v. *Kirwan*,(*e*) the testator, after vesting his freehold property in trustees, to pay his debts and raise a sum of money, gave his demesne, and his house, offices, and garden, in trust for his wife for life, at the yearly rent of 13*s*. an acre, she keeping the house, &c. in repair, and not leasing the premises, except to the person in possession of the remainder of his estates. The *residue* of his lands, "*subject* to the payment of his debts and legacies as aforesaid," he devised to *A*. for life, remainder to *B*. in fee; and bequeathed all his personal estate, except his stock of cattle &c. to his executors, to be applied in exoneration of his real property; first in the payment of debts, and then of legacies. Lord *Redesdale* determined, that as the testator's intention not to charge the demesne, &c. during his wife's life with debts and legacies, clearly appeared from the whole of the will, and more particularly in the direction as to the enjoyment by her, and the devise of the *residue* of the real es-

(*d*) 1 Younge & Jerv. Exch. R. 300.
(*e*) 2 Scho. & Lefroy, 444. 448.

tates *expressly subject* to the payment of debts and legacies, the demesne, &c. were not charged during the widow's life with those demands.

2. When legacies were held not to be charges upon the real estate.

The preceding cases, it will have been observed, afforded solid grounds for inferring the intention of testators to charge the real fund or its produce with legacies in aid of the personal estate. The real property was devised, and there were expressions connected with that devise, which afforded a reasonably plain inference, that the land or its produce should be taken, subject to the legacies. But where the intention to subject the real estate to legacies is merely probable, or conjectural, and there are no expressions of charge, except such as are capable of being otherwise satisfied, a court of equity will not act upon that conjecture or private persuasion, to effect the real estate with the payment of the legacies. When indeed an unprovided child or creditors are the persons endeavouring to establish the charge, the Court will incline in their favour, if the inference of intent to charge be dubious, as before observed; but where the question is between mere voluntary legatees and the heir or devisee, it seems that the Court will require satisfactory conviction of the intent to charge the real fund with the legacies before they subject it to those demands.(*f*) Accordingly, if a testator commence his will by the introductory words "as to all my worldly estate, I dispose of the same as follows, after *legacies* paid," and then he gave legacies, bequeath personal estate in the form of *residue*, and devise his real estate; in such a case the intention to charge the land, implied from the introductory words, is repelled by the contrary implication arising from the bequest of a *personal* residue which the testator supposed would remain after satisfaction of debts and legacies.(*g*) The link of connection, therefore, between the introductory words and the devise of the real estate (which existed in the preceding cases,) is interrupted and broken; and the introductory expressions are quite consistent and satisfied by imputing to the testator the intention that he meant his legacies to be discharged out of his personal property, and that estate only; consequently, there is no foundation for a court of equity to raise a charge upon the real, in aid of the personal fund, by implication. The following case is an authority upon this point.

In *Davis* v. *Gardiner*,(*h*) Mr. *Gardiner* began his will in this manner: "As to my worldly estate, I dispose of the same as follows: after my debts and *legacies* paid." He then gave legacies to children, payable at twenty-one, or upon marriage with consent, directing intermediate interest to be paid to them *by his executors*. And *after all his legacies* paid, he beqeathed the *residue of his personal estate* to his son, to whom he devised his real estate in fee, with a limitation over to his (the testator's) daughters, if the son died before them without issue. Under these dispositions Lord *Macclesfield* determined, that the legacies were not charges upon the real fund. First, because the bequest of the *personal* residue *after* debts

(*f*) See 2 Ves. jun. 328.
(*h*) 2 P. Will. 188.
(*g*) *Vide Minor* v *Wicksteed, ante*, p. 450.

and legacies paid was inconsistent with an intent to charge the lands with legacies; and, secondly, because the *interest* of the legacies was directed to be paid *by the executors;* a circumstance which his Lordship considered to be a material feature in the case.

The next case is remarkable in the circumstance of Lord *Alvanley*, M. R. referring to the distinction between debts and legacies, in regard to the requisite evidence of intention to create charges of them upon real estates. The principle extracted from the case is this: That the discharge of debts being a moral obligation and binding upon the conscience of a testator, a court of equity will lay hold of the slightest inferences of intention to pay them, and effectuate it by charging the real estate; but that, legacies being purely *voluntary*, the reason, which induces the Court to struggle in favour of creditors, to make the charge, does not apply at the instance of legatees.

The case alluded to is *Kightley* v. *Kightley*,(*i*) in which the introductory words were, "First, I will and direct that all my legal debts, *legacies* and funeral expenses shall be *fully* paid and discharged." Then the testator gave legacies, and devised his real estate. And Lord *Alvanley* was of opinion, that the introductory clause was not of itself sufficient to charge the *legacies* upon the real fund, and that there was nothing subsequently in the will showing the intention of the testator to make the charge, so as to authorize the Court to declare that the legacies ought to be raised out of the real fund, to the loss and disappointment of the specific devisees.

In a subsequent case of *Williams* v. *Chitty*,(*k*) Lord *Rosslyn* adverted to the principle laid down by the Master of the Rolls in the last case, and declared, "he did not know how to state the difference," in reference to charges of debts and legacies upon real estate. The case last referred to proves, that expressions in a will of a desire that debts should be paid, will be construed into a charge upon the real estate; so that in *Kightley* v. *Kightley*, had the claim been made by the simple contract creditors, Lord *Alvanley*, it is presumed, would have decided in their favour, upon the surmised intention of the testator. If, then, the testator must be supposed to have meant in that case to charge his lands with debts, it seems to be a natural inference that he must have entertained a similar intention in regard to legacies, since they are comprehended in the *same clause*.(*l*) It is true that in particular cases there is a great difference between debts and legacies, in consequence of the latter owing their existence to the will, whilst the former exist independently of that instrument. But it would be carrying the principle of that distinction to an unreasonable length, if it were allowed the effect of raising different and contradictory inferences of intention in a testator, when debts and legacies are included in the same sentence; *viz.* that the debts should be a charge upon the land, and the legacies no charge: an inconsistency that does not follow a determination against legacies being a charge upon the real estate, when they *alone* are mentioned in a clause so worded as that in *Kightley* v. *Kightley*. If the above observations be considered well founded, it follows that Lord *Alvanley's* decree cannot be supported.

(*i*) 2 Ves. jun. 328. (*k*) 3 Ves. 551. (*l*) 1 Meriv. 233.

The case of *Keeling* v. *Brown*,(*m*) stated in chap. XIV. sect. 1, is an instance in which the words of the will, and the introductory clause, "*Imprimis*, I will and direct that all my just debts and funeral expenses be paid and discharged as soon as conveniently may be after my decease by my executors, &c." have been considered as not furnishing sufficient evidence of intention to charge the real estate.

It may happen, from the manner in which a will is framed, that some of the legacies given by it shall be charges upon the real estate in exclusion of the others. An instance of this kind occurred in the case of *Hone* v. *Medcraft*,(*n*) which was to the following effect: The testator devised to his heir a part of his real estates, subject to and chargeable with debts, &c. "and *all* legacies *thereafter* mentioned, that is to say," &c. giving several general legacies; all of *which* he directed to be paid by his said heir; but if no heir could be found, he devised those estates to a Mr. *Lowndes*, subject to and chargeable with "all the legacies *before* mentioned." The testator next disposed of the remainder of his real property to charitable uses, and bequeathed some *other* legacies. Lord *Thurlow* determined, that the last class of legacies was not charged upon the real estates. But—

3. Questions of charge of debts or legacies upon the real estate can only arise where the will, containing such a charge, is executed and attested as required by the Statute of Frauds(*o*) to affect real property. Yet, when the will is duly executed charging the real estate, subtle distinctions have been made as to the power of a testator to alter, or bequeath to other persons, legacies so given and charged, by a codicil not executed according to the statute.

It seems, however, settled, that if a testator create a *general* charge of legacies upon his lands, in aid of the personal estate, by a will properly executed and attested, and he afterwards by a codicil, not duly excuted and attested to affect real estates, bequeath *additional* legacies; if the personal assets be insufficient to pay the whole, then the legacies by the codicil will be charges upon the real estate, equally with those given by the will.(*p*) The principle appears to be founded in analogy to debts; which, if charged *generally* upon lands, will include as well the debts incurred after, as those contracted prior to the date of the will. Lord *Hardwicke* is accordingly reported to have expressed the rule to the following effect: "When a real estate is duly devised to trustees, and is well *charged*, by a will duly executed, with debts and legacies; debts which are contracted *after* the will, or legacies given by a codicil, though not duly executed, will be a charge upon the real estate; for the real estate was well charged by the will with the debts and legacies; and it is immaterial by what instrument they appear, provided it has been *proved* as part of the will; and when that is done, it is sufficient to denote the *trust*, and *that* it is part of what was intended to be comprised.(*q*) In consistency with this declaration, it seems that his Lordship determined the following case:

(*m*) 5 Ves. 359. (*n*) 1 Bro. C. C. 261 and see *Masters* v. *Masters*, 1 P. Will. 421.
(*o*) 29 Char. II. cap. 3. (*p*) 1 P. Will. 423. Ambl. 33. 41. 3 Ves. 163. 164.
(*q*) See the reasons assigned by Sir *Wm. Grant*, 12. Ves. 37. and by Lord *Rosslyn*, 2 Ves. jun. 237.

The testatrix devised her residuary real and personal estates to her two sisters, "*after* payment of debts and legacies;" and by a codicil, without any attestation, she gave a legacy to her cousin. Lord *Hardwicke* decided that this legacy was a charge upon the real property.(*r*)

Since additional legacies may be given by an unattested codicil, so as to increase the charge upon the real estate, when that property is provided as an auxiliary fund for the discharge of debts and legacies *generally;* consistency of principle requires that a testator may, by an unattested codicil, dispose of a part or the whole of his personal estate, exempt from debts and legacies; although such a power, like the former, enables him by circuity to make the real estates the *primary* fund to answer those obligations. Such was the opinion of Lord *Alvanley* in the following case:

In *Coxe* v. *Basset*,(*s*) the testator charged his real estates with the payment of debts and legacies; and by an unattested codicil he gave to his wife all his personal estate, with the exception of particular articles, which were to go as heir-looms, &c. It was objected to this disposition, that where a testator has subjected his real estate in aid of his personal, as in the present instance, he could not by a subsequent unattested codicil give away any part of the latter fund, so as to increase the load upon the real property; or rather, that he could not by such an instrument so dispose of his personal estate as to *exempt* it from the discharge of his debts and legacies. To this objection Lord *Alvanley* answered, the testator might undoubtedly increase the charge with regard to legacies; a question of right long doubted, but then settled; and if he might increase it by legacies given by an unattested codicil, it was a necessary consequence that he might dispose of part of his personal estate as a specific legacy, and therefore exempt it (as in this case) from his debts and legacies, by a codicil not regularly attested; and so his Lordship determined.

It follows, from the power of a testator to give legacies by an unattested codicil, to affect real estate under a general charge of legacies by a duly executed will, that he may, by the like imperfect instrument, alter or revoke all or any of the legacies contained in the will, or substitute others.

Thus in *Brudenell* v. *Boughton*,(*t*) the testator, having a small personal and real estate, gave by his first will, which was duly executed, 800*l.* to his sister *Brudenell*, and to his sister *Layng* 400*l.* The residue of both funds, not before disposed of, he gave, "*after* payment of debts and legacies," to the defendant. By the second will he revoked all former wills, and bequeathed to his sister *Layng* only 100*l.*, and to his sister *Brudenell* only 400*l.* The residue of his estates he gave as in the first will. Lord *Hardwicke* determined, that the first will was *pro tanto* revoked as to those two legacies; and that the smaller sums in the second were charges upon the lands. His Lordship thus expressed himself: "Suppose a man to make two wills, the first charging the real estate with legacies; and that by the second there are general pecuniary legacies, but

(*r*) *Hannis* v. *Packer*, Ambl. 556. and see 8 Ves. 498.
(*s*) 3 Ves. 159. 164. and see *Buckeridge* v. *Ingram*, 2 Ves. jun. 652. 665.
(*t*) 2 Atk. 268.

it is not executed in form; yet I have no doubt of the latter legacies being a charge upon the real estate.(*u*) But there is no occasion to go so far in the present case, because the legacies in the second will may be considered as part of the money given by the first, only *new modelled* or qualified. These are less sums; 100*l.* instead of 400*l.*, and 400*l.* instead of 800*l.* If given exactly in the same manner, and to the same persons, there could have been no doubt; but there being less sums, would have been a revocation *pro tanto*, and undoubtedly a charge upon the land; but being given differently, and to different persons, makes the nicety. However, I am of opinion, this is no more than a lessening of the *quantum* of the money given by the former will, and only differently modified; and I must decree the less sums to be raised out of the real estate."

Upon the principle of the last authority, Lord *Alvanley* determined the case of *Attorney General* v. *Ward*,(*x*) in which *Sarah Kipling* devised her real and *personal* estates to a trustee to sell; and, after directing the *joint* proceeds to be applied in discharging the costs of the sale, her debts, funeral, and testamentary expenses, she gave *legacies*, among which was one to the children of a Mr. *Daniel*, if there should be a sufficiency to discharge it, after payment of debts, funeral, and testamentary expenses and legacies; and in case of a residue, she gave it to charity. The testatrix afterwards made a codicil (which was not properly attested to charge freehold estate,) and bequeathed to her brother's son, *C. Kipling*, the 300*l.* designed for the children of Mr. *Daniel*. The question was, whether, as that legacy was a charge upon the real property by the will, it was effectually revoked and given by the irregular codicil to the son of Mr. *Kipling*? And Lord *Alvanley* decided in the affirmative; declaring, that the legacy of 300*l.* given by the will to the children of Mr. *Daniel* was revoked(*y*) by the codicil, and was well given by the codicil to Mr. *Kipling*.

In delivering the judgment in the last case, his Lordship observed: "If this were a legacy charged *only* upon the land, nothing can be clearer than that it could not be altered, either as to the *quantam* or the *person*, by any will but such as would have affected land; but, being upon a *mixed* fund and *once* well charged, the testatrix may afterwards modify or *alter* it, as she thinks fit. If a testator say, he charges all the legacies given by his will upon his real estate, and give 20*l.* to *A.*, he may, by an unattested codicil, give *that* legacy to *B.* It has been determined, that you cannot *create* new legacies, but you may modify or alter any before given. You cannot give fresh legacies upon land, unless *future* legacies be charged, but you may substitute one for another."

Hence, if the charge of legacies upon the real estate, in aid of the personal, be *not general*, but of legacies *partially*; as if it were of legacies "hereby given," or "of the several other legacies *hereinafter* bequeathed:" in neither case will legacies by an unattested codicil be charges upon the real estate; because, in each instance, the charges are confined to bequests *in the will*, and are not, as in the preceding case of *Hannis* v. *Packer*, charges of legacies generally.

(*u*) See the last case. (*x*) 3 Ves. 327. (*y*) 8 Ves. 499. 2 Atk. 273.

Thus in *Bonner* v. *Bonner*,(*z*) the testator, after giving several legacies or portions to his children, devised his real estates (subject to a term of 1000 years) to his second son for life, with remainders over. The trustees of the term were directed to raise out of the rents and profits of the lands comprised in it, or by mortgage or sale, and pay to his children "the several legacies *hereby given* to them with interest, and also the several other legacies *hereinafter* bequeathed." He then gave a few small legacies; and afterwards, by an unattested codicil, he bequeathed *additional* legacies to some of his children, which were declared by Lord *Eldon* not to be charges upon the real estate, since the charge of legacies by the will was not general.

In the preceding cases, it is observable, that the real estate was the *auxiliary*, not the primary fund, for payment of the legacies; consequently, the unattested codicils were allowed to operate, either in giving additional legacies where the charges of the lands by the wills were of the legacies *generally*, or in altering or revoking those which affected the real property, under *partial* charges in the wills. But where the real property is the *only* fund for the legacies, those charges can neither be altered nor revoked by a codicil not executed and attested, as required by the Statute of Frauds. Such was the opinion of Lord *Alvanley* in the case of the *Attorney General* v. *Ward* before stated, and of Lord *Hardwicke* in *Brudenell* v. *Boughton*, who said, "It is very certain no devise of lands can be made, but with such solemnity accompanying the execution of it, as directed by that statute; and it is equally clear, where a sum of money is given *originally* and *primarily* out of land, a will, with that charge, must be equally executed with the same solemnity, because it is considered part of the land: a construction analogous to the rule of law, that a devise of rents and profits is a devise of the land itself. The rule is the same as to *revocations* of a devise of lands; and with respect to a revocation of a sum of money charged by a will upon lands, they must be revoked in the same manner."(*a*) If then legacies charged by will upon real estates, as the *primary* fund, cannot be affected by an unattested codicil, much less can such an instrument create *additional* legacies to be paid out of that estate in the first instance.

In illustration of the above remarks, the following cases are produced:

In *Sheddon* v. *Goodrich*,(*b*) Mr. *Goodrich*, having one son and three daughters, gave, by will duly executed, his lands, &c. in the islands of *Bermuda*, to his wife for life; and after bequeathing to her and his children general legacies, he directed his executors to sell, after his wife's death, his real and personal estates, and to pay, with all convenient dispatch after the sale, 6000*l.* to each daughter, &c. and appointed his son residuary legatee. The testator, upon the birth of a daughter, made a second will, which was attested by *two* witnesses only; and, after revoking all former wills, he disposed of his real estates in *Bermuda*; bequeathed to his wife a legacy, and gave his residuary estates to his son and four daughters. To this second will the testator added a codicil, attested by the same

(*z*) 13 Ves. 379. (*a*) 2 Atk. 272. and see 18 Ves. 167. (*b*) 8 Ves. 481.

two witnesses only; by which he varied the dispositions of the second will. As to the effect of the two latter instruments upon the former, Lord *Eldon* declared, that, as the *English* real estates were not, by the first duly-executed will, absolutely converted into personal estate, neither of the latter instruments could either *revoke* or *alter* the dispositions contained in it, but that since the lands in *Bermuda* would pass by a will, without the attestation of three witnesses, they were well disposed of by the second will and codicil.

The principle of Lord *Eldon's* decree appears to be, that the case was an attempt to dispose of the produce from a sale of freehold property by a will and codicil not attested as required by the Statute of Frauds. But his Lordship inclined to an opinion, that, if by the duly executed will, the lands had been absolutely and for ever converted into personalty,(*c*) the second will would have revoked the first; and the real proceeds, in its new character of personal estate, would have been well disposed of by the latter will and codicil. With respect to this point, Sir *William Grant*, M. R. made the following remarks: "I have always understood, that an unattested will or codicil could have no operation on the land, or its *produce*. There are indeed some expressions in the report of *Sheddon* v. *Goodrich*, which seem to imply that a testator may consider his real estate as by his will thrown into personalty, so that he could act upon it as if it were personal property; but *I cannot conceive any such case*, that a person can enable himself to dispose of his real estate or its produce, by any other sort of will than the law requires to pass land."(*d*)

In *Hooper* v. *Goodwin*,(*e*) the testator by a will duly executed, devised his real estates to trustees to sell, and invest the money in stock, for the purpose of answering the legacies and annuities *given by his will*. He then bequeathed several legacies and annuities; and gave his residuary estate to four persons as tenants in common. The testator afterwards made a codicil, attested only by two witnesses, and attempted to dispose of the share of a residuary legatee who happened to die before him. Sir *William Grant* determined, that so much of the deceased's share, as consisted of the proceeds from a sale of the real estate, did not pass by the codicil; the conversion of that fund not being absolute, but for particular purposes; and therefore that the lapsed interest, being part of the produce of the realty, belonged to the heir of the testator.

It will make no difference, although the testator *expressly* reserve to himself, by his duly-executed will, a power to dispose of his real estate or its produce by an unattested codicil, and for the reasons detailed by Lord *Eldon*, *viz.* "I take it to be decided (said his Lordship, referring to a future unattested paper,) and there is no doubt that a paper, made *subsequent* to the will could never be part of it, for the three witnesses required by the statute, are witnesses to the *sanity* of the testator, and to all that is necessary to constitute a good will. The consequence is, that the subsequent paper has not the ceremonies necessary to constitute a devise of land. The cases upon a charge of legacies by a will with three witnesses apply to this; and, although it be settled that legacies given by an unattested

(*c*) See Chap. IX. which treats of this subject.
(*d*) 18 Ves. 166. (*e*) Ibid. 156. 1 Jacob. 375.

paper will be included in that charge; that has been met at least with this symptom of disapprobation, that it is remarked as a solitary case,(*f*) and if, by a will duly attested, the devisor direct an estate to be sold, though he could have exhausted that fund by legacies, he could not by a will unattested give away part of it."(*g*)

Consistently with these observations, Sir *William Grant*, M. R. decided the case of *Rose* v. *Cunynghame*,(*h*) in which Mr. *Undy*, by will duly executed, devised his plantations and estates in the island of *Grenada* to trustees, with directions out of the produce to discharge incumbrances affecting the property, and "to pay all such annuities, legacies, or bequests, as he *should* give or bequeath, to be paid out and from, or charge and make chargeable upon, his real or personal estate in *Grenada* by his will, or by any *writing* or *writings*, at any time or times *thereafter*, signed by him, or in his own hand writing, *whether witnessed or not*;" and, after payment of the *said* debts, &c. *as aforesaid*, the residuary annual produce, as also the produce of his personal estate in that island, were to accumulate until the year 1810, when his nephews were to have the estates, and the accumulation was to form part of the residue of the testator's personal estate. And, after charging his plantations and estates with two annuities, one being of 200*l.* to his wife, he devised to the same trustees his real estates in *England*, and all other his real and personal estates, (with the exception of such parts "as by *that his will*, or by any *codicil* or *codicils thereto*, or other writing to be signed by him, or wrote with his own hand, *whether witnessed or not*, he had disposed or *should* dispose of,") in trust to sell, and pay his funeral expenses, the costs of proving the will, his debts, (except those before provided for out of the *Grenada* estates,) and such legacies as he had given by his will, or which he should give by any codicil thereto, or by any writing signed by him, or in his own hand-writing, whether witnessed or not." The testator then gave several legacies, and disposed of the residue of his real and personal estates. By an unattested codicil he gave to his wife an additional annuity of 100*l.* from his *Grenada* estate; and the question was, whether that estate was well charged with it? And Sir *W. Grant* determined in the negative.

The principle of the decree appears to have been, that the *Grenada* estate not being charged with the payment of legacies and annuities generally, in aid of the personal estate; but with those only bequeathed by the will, and such (as expressed and intended) as should be given in future by a codicil or writing, whether attested or not, and as the primary fund for their payment; the power so reserved to dispose of the proceeds of real estate by an unattested instrument could not be supported, since the Statute of Frauds: consequently, the unattested codicil in the present instance was insufficient, either of itself, or by aid of the will, to charge the additional annuity upon the *Grenada* estate. This case therefore is the same in principle with that of *Sheddon* v. *Goodrich* before stated.(*i*)

It may happen that an unattested paper writing may be referred to in a duly executed will, as then in existence, for the disposition of the real estate or of the whole or part of its produce. The effect

(*f*) 18 Ves. 167. (*g*) 1 Ves & Bea. 445. (*h*) 12 Ves. 29. (*i*) *Ante*, p. 459.

of such an instrument in consequence of that reference, is necessary to be considered.

It was said by *Wilson* J. in *Habergham* v. *Vincent*,(*k*) "he believed it to be true, and had found no case to the contrary, that if a testator in his will refer expressly to any paper already written, and he so describe it, that there can be *no doubt* of the identity, and the will is executed in the presence of three witnesses; that paper makes *part* of the will, *whether executed or not;* and such reference is the same as if he had incorporated it." This was assented to by *Buller*, J. in the same case.(*l*) Lord *Eldon's* language upon this subject is as follows: "That an instrument properly attested in order to incorporate another *not* attested, must *so describe it*, as to be a manifestation of what the paper is, which is meant to be incorporated, in such a way, that a court of equity can be under no mistake."(*m*) It might have been concluded from these declarations, that this point was settled; but we find Lord *Eldon* stating, on a recent occasion, "that the cases so far as they had gone, *raised doubts*, even as to a paper antecedently existing, but clearly and undeniably referred to in the will."(*n*) This point, though not as yet the subject of express decision, cannot be considered as unprejudiced by opinion. In the following case Lord *Eldon* determined, that the paper writings, referred to by the will, were not sufficiently described and identified, as to be incorporated in it, so as to dispose of the rents, and the produce from the sale of real estates.

The case alluded to is *Smart* v. *Prujean*,(*o*) in which Mr. *Lowe*, a catholic priest of *Gravelines* in *Flanders*, being seised in fee of real estates in *England*, gave them, by will duly executed, to trustees, in trust to sell, and apply the intermediate rents "for such persons and purposes as he (the testator) *should* by a private letter or paper of instructions, which he mentioned in his will, he *intended* to *leave* with a Mrs. *Johnson*, then residing at *Gravelines*, or with her successor for the time being, should appoint." And he directed his trustees, immediately after the sale, to pay the proceeds with interest till payment, "to and for the benefit of such person, and in such manner as he, by the like private letter or paper of instructions, should appoint." He then gave legacies to his trustees; and his residuary real and personal estates to the same trustees, "for the use of such person as should be named in the same letter or paper of instructions," and he appointed the trustees executors. The testator died at *Gravelines;* and two papers were found in the same envelope with the will, in his bureau, in the room where he resided, belonging and adjoining to the monastery of *English* nuns at *Gravelines*, of which Mrs. *Johnson* (referred to in the will) was the superior. The envelope was sealed and endorsed by the testator thus: "The will of *Anthony Lowe*." The paper writings were written by the testator; one of which, addressed to his trustees, directed them to pay the rents of his houses till sold, or if sold, the net proceeds to Mrs. *Johnson*, or her then successor, or

(*k*) 2 Ves. jun. 228. (*l*) Ibid. p. 232. (*m*) 6 Ves. 565. (*n*) 1 Ves. & Bea. 445.
(*o*) 6 Ves. 560. and see the case of *Wilkinson* v. *Adam*, 1 Ves. & Bea. 426. 445. 461.

to such other person as they or either of them should appoint. The other paper writing was addressed to Mrs. *Johnson*, directing her how to apply the proceeds from the sale of his real estate and his personal property, which was in discharging a debt and legacies, giving the residue to herself. The question was, whether those paper writings were so referred to by the will, as that they could be clearly identified as the very letter or paper of instructions mentioned in such will, so as to be embodied in, and made parts of it? And Lord *Eldon* determined in the negative; observing upon this part of the case, as follows: "The true question is, if these papers were found in the bureau with the will, can I say from the contents of the will, that these two papers are those referred to. Suppose several other papers were found with them, could I say this will would have enabled me to select these two as the only papers referred to. The rule, and my opinion are, that the will has not by its contents sufficiently identified those papers to enable me to say, that they are necessarily incorporated; if not, they are not attested by three witnesses, and it is admitted that this sort of disposition, unless the antecedent paper is incorporated, cannot be brought within the rule as to debts and legacies charged on real estate by an unattested paper." The consequence was, that, for this defect, his Lordship declared that the persons claiming under those paper-writings were not entitled.

SECT. III. Of Exoneration.

Where there is no doubt as to debts and legacies being effectually charged upon the real estate, it is necessary to ascertain when the personal is to be *first* applied, and the real estate is an *auxiliary* fund only; and when the real estate is the *primary*, and the personal estate the secondary fund. In prosecuting this enquiry, it is proposed to consider,—

1. When the personal estate is *first* applicable to the satisfaction of debts and legacies.

The rule is general, that in the absence of contrary intention the personal estate is the first and natural fund for the payment of debts and legacies; and the real estate is only to be resorted to in aid of the former. A court of equity has, in several of the cases after mentioned, attached considerable importance to the circumstance of the devisee of the land being also legatee of the personal estate, considering it to be a strong mark of intention that the testator could not mean to exempt the personal fund to the prejudice of the real, when both of them were given to the same individual. And it seems to be now settled, that whether the real estate be devised to a person, *upon condition* of his paying debts and legacies, or be *charged* with them generally, or whether it be given to *trustees* for those purposes, and the personal estate is disposed of by a *general* residuary bequest,(*p*) none of these circumstances will prevent the personal fund being applied, in the *first* instance, to the satisfaction of those demands. The following cases will establish those remarks:

(*p*) *Philips* v. *Philips*, 2 Bo. C. C. 274. see *infra* sub-div. 2. *Fitzgerald* v. *Field*, 1 Russ. 428.

In *Dolman* v. *Smith*,(*q*) Sir *T. Dolman*, after bequeathing legacies, devised his real estates to trustees for the payment of debts, legacies and funeral expenses, with which he *charged* those estates. He then directed his trustees to receive the rents and profits, until his nephew *Thomas*, attained twenty-five, and to allow him out of them 30*l.* annually; also 20*l.* a year to *Lewis* and *Dorothy*, till they attained the same ages; and the residue of the rents, with the estates, he limited to *Thomas* in tail male, remainder over, directing several articles of personalty to go as heir-looms with the estates. He then gave the *residue* of his goods, chattels, and personal estate, before unbequeathed, to his nephew *Thomas*, the devisee of the lands, and appointed his trustees executors. The Court decreed, that the personal estate was primarily liable to the debts and legacies.

The above decision will agree with modern authorities, if it be referred not to an absence of what was then, and in that case considered requisite, *viz.* an express *clause* exempting the personal estate, but to the general rule before stated, and to the inference in support of it, arising from the improbability of the testator intending to exempt the personal estate from debts and legacies, in order that the nephew might, at any time before the age of twenty-five, have the opportunity to receive and spend it, in opposition to the cautious and frugal manner in which the rents and the real estate were devised in trust for his benefit. Besides, as the Court observed, since both funds were to come into the same hands, the testator could not with reason be presumed to entertain so very frugal an intention, as to one fund, and not to extend the same frugal intention to the other.

So in *Harewood* v. *Child*,(*r*) the testator devised his real estates to trustees, in trust to raise, as in the will mentioned, sufficient money to pay his debts; and after such payments, and reimbursing themselves, the trustees were to hold the remainder of the premises to the uses previously limited of the manor of *C.*, which were to the use of his daughter in tail, with remainder to his nephew Then he gave *all* his personal property to his daughter, whom he appointed *executrix*. It was determined, that the personal estate was first applicable to pay the debts, in exoneration of the real, notwithstanding the express devise of the latter for the purpose.

Nearly similar in every respect to the last case is that of *Haslewood* v. *Pope*.(*s*) The trust of the real estate was the same, with the exception of the clause directing the trustees to reimburse themselves; and the beneficial devisee of the estates was the testator's daughter in tail, who was a minor, and to whom he also gave "*all* his personal estate," appointing her *sole executrix*. Lord *Talbot* declared the personal fund to be first applied to answer the debts, observing, that his opinion was chiefly founded on the circumstance of the legatee of the personal estate being also devisee of the surplus real estate in tail; for, (said he) "I cannot think it was the testator's intention to exempt his personal estate from his debts, for no other reason than that his daughter might dispose of

(*q*) Pre. Ch. 456. *et vide French* v. *Chichester*, 3 Bro. Parl. Ca. 16. 8vo. ed.
(*r*) Stated in Forrest, 204. (*s*) 3 P. Will. 324. ed. by Cox.

it by will under the age of twenty-one, on purpose to leave the real estate, settled on herself in tail, the more incumbered."

It is worthy of observation, that in the two last cases, the personal estate was not given by the term *residue*, and yet that circumstance was not considered as showing any intention in favour of the legatee, to the prejudice of the devisee of the real estate, the legatee of the personal being also appointed sole executrix; a character in which she naturally took the personal estate, with all the burthens attached to it in a regular course of administration.(*t*)

In Lord *Inchiquin* v. *French*,(*u*) Lord *Thomond*, after directing his debts to be paid, vested all his real estates in trustees, to sell a *sufficient part* of them to pay debts and *legacies*, and to reimburse themselves all charges; and after those payments, to convey the remaining estates to Lord *O'Bryan*, then a minor, in tail male, with remainders over. The testator then gave a legacy of 20,000*l.* to *A.* and directed the produce from the sale ordered of his real estate, to be *accounted personal*, and gave all the *residue* of his personal estate, *after payment of debts and legacies*, to Lord *O'Bryan*. Lord *Hardwicke* determined that the personal estate was the primary fund for the payment of the debts and legacies; and he approved of the case of *Harwood* v. *Child* before stated.

The grounds of his Lordship's opinion were these; 1st, that it was neither expressed, nor was there a *plain necessary implication* arising from the will, that the testator meant to exempt his personal estate from its natural obligation; 2dly, that by the direction to the trustees to pay debts and legacies out of the real proceeds was to be understood, that they should raise so much money out of that fund as, *with* the personal estate, would be sufficient to pay debts and legacies; 3dly, that the intention to subject the personalty to those demands was clear, from the direction of the net produce of the lands sold to be considered personal estate, the proper fund to answer those payments; and lastly, because it could not be supposed the testator would have ordered part of his real property to be sold in order to give Lord *O'Bryan* a greater personal estate, who was, under the same will, to take the real, and at that time a child of very tender years. Lord *Hardwicke* concluded with an observation, sound in principle, and which, if now followed, would erect some mark as a guide to form opinions upon subjects of this kind. "The construction I have made (said his Lordship) is agreeable to the *express* words, and no *implication can be to over-rule them.*"(*x*)

In conformity with the preceding authorities, Lord *Thurlow* determined the case of *Samwell* v. *Wake*,(*y*) in which the testator, after desiring that his debts and legacies should be paid, and to that end *charged all his estate* with them, directed his trustees to sell his estate, and apply the money in discharging debts and legacies; and, subject to those payments, he devised the lands to his natural son for life, with remainders over; then gave legacies, and the *resi-*

(*t*) See *Brummel* v. *Prothero*, *infra*, and 1 Eden. 45. 2 Scho. & Lefroy, 543.
(*u*) Ambl. 33. 37.
(*x*) A proposition acted upon in the case of *Morrow* v. *Bush*, 1 Cox, 185.
(*y*) 1 Bro. C. C. 144.

due to the plaintiff. Lord *Thurlow* declared the personal estate was to be first applied in satisfaction of the debts and legacies.

In regard to the exemption of the latter fund from its natural obligation to pay debts and legacies, his Lordship made the following remark: "It is not sufficient to charge the real estate, but a testator must *show* that it was his purpose *the personal should not be applied;*" a manifestation of intent not necessary to be in express words, as will afterwards appear, but to be collected from a sound interpretation of the whole will; and it is to be noticed that, in the last case, the devisee of the real estate and the legatee of the personal, were not, as in the preceding cases, the same person; a circumstance therefore which is not, of itself, sufficient to prevent the application of the general rule.

The next case before Lord *Thurlow* was the Duke of *Ancaster* v. *Mayer*,(z) a case in which his Lordship reviewed preceding authorities; and it has been since referred to as the standard by which questions of this kind are to be determined.

In that case the testator, after creating a term of ninety-nine years in his real estates in *Lincolnshire*, devised those estates, subject to it, and in default of his own issue, to *Montague Bertie* for life, with remainders over. He then declared that his trustees should be possessed of the term, to raise out of the rents and profits, or by mortgage, assignment, or demise of the estates, money sufficient to pay *his debts, funeral expenses, and legacies*, after which the term was to cease. Towards the conclusion of his will, the testator gave *all* his household goods, chattels, effects, and personal estate whatsoever, unto *Montague Bertie*, if living at his (the testator's) death, but if not, he devised the same to the person who should be entitled to the freehold of his real estate under the limitations in his will; provided that if he (the testator) left issue, the limitations of his real estate, and the devise of the *residue* of his personal estate should be void, &c.: and he appointed his *trustees executors*, directing them to pay his *personal charges*, and *all his debts and legacies* when due, and *by such methods* as they thought proper, empowering *them as executors* to reimburse themselves their expenses in proving the will, or otherwise in the execution of such will, out of his *personal* estate, or out of the money to be raised under the term of years. One of the questions was, whether the personal estate was exonerated from the debts? And Lords Commissioners *Ashurst* and *Hotham* were of that opinion, and so decreed. But their opinion not being satisfactory, the cause was re-heard by Lord *Thurlow*, who reversed the decree after great consideration, and declared that the personal estate was first applicable to pay the debts.

His Lordship professed the ground upon which he founded his judgment to be, not any particular criticisms, but simply upon the rule of law; *viz.* the testator not having declared by express words, nor any other declaration which would tend in law, to preserve the personal estate for any given purpose whatsoever. The creation of the term could not repel the general rule, for that had no greater effect than subjecting the estate to the payment of debts; it afforded

(z) 1 Bro. C. C. 454. and see Lord *Eldon's* comments, 1 Meriv. 227. and *M'Cleland* v. *Shaw*, 2 Scho. & Lefroy, 538. stated *infra*.

no stronger inference of an intent to exempt the personal estate, than a devise in trust to sell, &c. for the discharge of debts, which occurred in preceding cases. Similar to those cases, the devisees of the real estate and the legatees of the personal were in this instance the same, circumstances which, as we have seen, had great importance attached to them. But the present case is much stronger against the exemption of the personal fund than the authorities before stated. The trustees of the term were appointed *executors*, and they, in the latter character, were directed not only to pay *all* debts, legacies, and funeral charges, by the *methods they thought proper* (duties which as *trustees* they had been previously ordered to perform by means of the term of years,) but also the expenses of probate, and their own charges as executors; the testator thus blending the two characters and estates, and giving an *option* to the *executor-trustees* to pay all those demands out of the personal fund. Hence, instead of any inference of an intention appearing to exempt the personal fund, the testator pretty clearly *expressed* his meaning, that it should be primarily liable, and then, according to Lord *Hardwicke*, in the case of Lord *Inchiquin* v. *French*, before stated,(*a*) against expression, no implication could be made. Upon the whole, Lord *Thurlow*'s decree seems to be quite in harmony with the principles of the preceding cases.

The next case differs from former authorities, in the particular that there was no disposition of the personal estate, except by the appointment of an *executor;* as to which Lord *Rosslyn* said, "no case had decided that the mere nomination of an executor, though under circumstances which would give him beneficially the personal estate, should have the same effect as a *distinct specific* gift of it to *an individual.*"

The case alluded to is *Gray* v. *Minnethorpe*,(*b*) in which Mr. *Simpkin* devised part of his real estate to trustees to sell, and to pay, out of the proceeds, *all his debts and funeral expenses*, and to invest what remained on securities, and pay the interest to his brother for life, and to divide the principal, after his brother's death, among his nephews and nieces. The testator gave another estate to his brother in tail, and appointed him sole executor, and Lord *Rosslyn* determined, that there was nothing in the will to exempt the personal estate from the debts.

In *M'Cleland v. Shaw*,(*c*) the executors were trustees of the personal residue for the testator's *next of kin*, and although Lord *Redesdale* decided the case upon a review of all the circumstances of it, yet he (as Lord *Rosslyn* in the last case) relied upon there being *no specific* disposition of the residue.

Mrs. *Burgess* being possessed of personal property of inconsiderable amount, and of real estate of some value, first devised all her right, title, and interest in some of the latter to trustees, for the uses after mentioned. She then directed the trustees to sell those lands, and to apply the proceeds in the following manner: First, she desired her *funeral expenses* and *debts* to be paid out of the purchase money; then particular sums to certain creditors of her late husband,

(*a*) *Ante*, p. 465. (*b*) 3 Ves. 103.
(*c*) 2 Scho. & Lefroy, 538. 543. *vid. infra*, Chap. XXIV. sec. 2. div. 3.

She proceeded to give general legacies, including 20*l.* to each of her executors for their trouble, "the *said several* sums to be paid by her executors *and trustees* out of the money to arise by sale of the lands," and the purchase money that remained *after payment* of her legacies, and the expenses of her will, she directed to be divided into four parts, giving the shares in different proportions to several persons, and ordering "the same several *legacies* to be paid by her *executors*, so soon as they could dispose of the estate." She then appointed her trustees *executors and trustees* of her will. Lord *Redesdale* was of opinion that the personal estate was the primary fund to satisfy those demands; observing, "the construction put upon such words *standing singly*, had ordinarily been that for payment of debts, funeral expenses, and legacies, the real estate should be applied in case the personal should not be sufficient; the latter being the primary fund applicable to the discharge of those obligations. That it was generally considered a testator did not mean to charge a fund which was not applicable to those purposes by law, without a direction so to apply it, except in aid of the estate, "which by law was so applicable, unless there were expressions strong enough to show a different intention."

Without considering the circumstance of there being no specific disposition of the residue, this case seems to be governed by Lord *Thurlow's* determination in *Ancaster* v. *Mayer*. The testatrix appointed her *trustees* also *executors*, blended the two characters, directed the payments to be made by them as trustees and executors. "The appointment of the trustees executors (said Lord *Redesdale*) gives them *primâ facie* the personal estate for the purposes of her will, and their duty as executors is to pay her debts, funeral expenses, and the probate out of that fund, the receipt of which charges them as debtors to the creditors of the testatrix.(*d*)

But to avoid mistake, it is to be observed, that neither of the last two cases meant to determine, where a testator has exempted his personal estate from debts and legacies, and directed them to be paid out of his real property, making no disposition of the personalty, that his executor or next of kin should not have the benefit of the exemption. They only import, consistently with Lord *Eldon's* observations in *Milnes* v. *Slater*,(*e*) that, when a testator has not in words exempted the personal assets from debts and legacies, but his intention to do so is to be collected by *inference* from the whole of his will, and there is no disposition of the personal fund, except in the appointment of an executor, the inference from that nomination will not, of itself, be considered sufficient to exonerate the personal estate, whether the executor take it beneficially or as a trustee for the next of kin; because, to the office of executor the payment of debts and legacies is naturally attached; and, as the executor's legal right is merely to the surplus, after those obligations have been satisfied, the testator might have meant nothing more in the nomination of executor. But where a testator has expressly exempted his personal property from debts and legacies, created another fund for discharge of them, and made no disposition of his personal estate,

(*d*) 2 Scho. & Lefroy, 546, 547. and see 1 Meriv. 227. and *infra*, sub-div. 2.
(*e*) 8 Ves. 305.

except in naming an executor, then, whether he take that fund beneficially or as a trustee for the next of kin, he or they will be entitled to it, exonerated from those payments; for unquestionably a testator has the power to make such an arrangement, in relation to his estates, as between his real and personal representatives.

Following the current of preceding authorities, Lord *Alvanley* decided the case of *Brummell* v. *Prothero*,(*f*) which was to the following effect:

Mr. *Blewitt* devised his real estates to a trustee, *first* to pay *all his debts*. He then gave two annuities out of the property, and, subject to and charged with them, he devised the estates to his brother *Edward* in strict settlement, with remainders over. Lastly, he bequeathed to his same brother *all* his monies, goods, chattels, rights, credits, personal estate, and effects, and appointed him *sole executor*. Lord *Alvanley* determined, that the general rule must prevail, and the personal estate be first applied in discharge of debts.

The reader will have remarked the coincidence of the last case with the preceding authorities of *Harewood* v. *Child* and *Haslewood* v. *Pope*, before stated,(*g*) in Lord *Alvanley* considering a bequest of *all* a testator's property, to the person named sole executor, equally residuary, as if it had been expressly given by the term *residue*, and therefore as affording no inference of an intention to exempt it from debts.

Tait v. Lord *Northwick*(*h*) is another case decided by Lord *Rosslyn* on the present subject, and in conformity with the general rule. There real estates were vested, by settlement, in persons, in trust to pay debts, and subject thereto, and to some other charges, they became disposable by the appointment of *Richard Middleton*, the testator, who appointed them, and also devised other estates of his own to three trustees, in trust by sale, mortgage, &c. to *pay debts* owing to a particular creditor, and all his (the testator's) other debts with interest, and to defray the interest of money to be borrowed out of the rents, and to apply the surplus rents in reduction of principal. The trustees were directed, after fulfilment of these trusts, and *payment* of the *costs attending their execution*, to convey the estates unsold to the uses and upon the trusts of the settlement (after payment of the debts, &c. thereby directed to be discharged,) which were to the testator in tail, with remainders over. After giving to each trustee a legacy of 100*l.* the testator bequeathed the *residue* of his *personal* estate equally between his two sisters, and appointed two of his trustees executors. Lord *Rosslyn* was of opinion, that the personal fund was primarily liable to pay the debts.

His Lordship observed, "that *charging* the real estate *ever so anxiously* for the discharge of debts would *not of itself* exempt the personal," a proposition clearly established by the preceding cases.(*i*) And it is worthy of notice, that his Lordship thought neither the gift of the residue nor the direction for payment of the expenses of performing the trusts, as being only applicable to the real estates, was sufficient, in concurrence with the *charge*, to show a clear and satis-

(*f*) 3 Ves. 111. (*g*) *Ante*, p. 464. (*h*) 4 Ves. 816.
(*i*) See *Aldridge* v. Lord *Wallscourt*, 1 Ball. & Beat. 312.

factory intention in the testator to exonerate the personal estate from its legal obligation.

The last authority seems to have been the basis upon which Lord *Alvanley* decided the case of *Hartley* v. *Hurle*,(*k*) which is a determination, that where debts, legacies and *funeral* expenses are charged upon the real estate, and the personal property is bequeathed with the real, as "rest and *residue* not *otherwise* disposed of," the personal estate will not be exonerated from the payment of debts. His Lordship considered such a disposition to import nothing more than a gift of what was not before given, *not as a specific* legacy, but a bequest *of what might have been omitted*

The case was this: Mr. *Allen* directed all his *debts*, *funeral*, and *testamentary* expenses to be in the first place fully satisfied. He then gave to his wife specific legacies of household goods, &c. and money, and gave and bequeathed his real estate and money in the funds to trustees, upon trust, "out of the *rents* and *dividends* to pay his *debts*, *funeral*, and *testamentary* expenses, and the several legacies after mentioned," which he proceeded to enumerate, and then gave general legacies; and out of the same rents and dividends, an annuity to his wife for life, bequeathing the surplus rents and dividends in trust, that his trustees should pay them into the proper hands of his daughter *Ann*, until his grand-daughter attained twenty-one or married; on either of which events, the grand-daughter was to receive an annuity of 300*l.* for life out of the rents and dividends, and the residue of them was to be paid *into the hands* of his daughter for life, remainder as to the lands themselves, and the stock, to his grand-daughter absolutely. The testator then declared, that the leaseholds should not be sold, and gave the *residue* of his *real* and *personal* estates, "not by him otherwise disposed of," to his daughter absolutely, and appointed her and the trustees executors. Lord *Alvanley* was of opinion, that the personal estate was the primary fund for the payment of debts.

In the last case we perceive, that neither the direction to pay the debts, &c. out of the rents and dividends of the real and funded property, nor the gift to the daughter of the personal residue, was sufficient to counteract the general rule. In order to have such effect, the inference of the testator's intention to exonerate his personal estate ought to have been *so clear* as to have left no doubt upon his Lordship's mind, which was not so in the present case; his Lordship observing, that he found no case in which a testator, after beginning with a direction for the payment of debts and *funeral* expenses (which naturally fall upon the personal estate and are to be paid by the executors) has created a fund for his debts and funeral expenses, and then given the *residue* by such words as those before stated (for the residue was not settled to the daughters *separate use*,)(*l*) and it had been held, that he meant that trust fund as anything more than *auxiliary*, if the personal estate should be deficient; and with *that impression* his Lordship said, he was not at liberty to determine in favour of the residuary legatee.

With respect to charging the *funeral* expenses upon the real estate,

(*k*) 5 Ves. 540. and see 1 Meriv. 236.
(*l*) See *Greene* v. *Greene*, 4 Mad. 148. stated *infra*.

it will have been remarked in the perusal of the preceding cases, that in some of them those expenses have been charged upon that fund, and not in others; and yet the determinations have been uniform against the exoneration of the personal estate. The attention of the reader is drawn to this observation, since in the authorities which will be stated under the second subdivision of this section, it will appear that such a charge, in concurrence *with other circumstances*, has had importance attached to it, in exempting the personal estate from debts, &c. upon the reasoning, that as funeral expenses particularly attach themselves to the personal fund in the hands of *executors*, the testator, by transferring that duty from them to the trustees of the real estate, must have intended to give the whole of the personalty to the legatee, *specifically* discharged from every obligation to which it was naturally liable. But that such a charge of *itself* will not have that effect, the preceding authorities and the case which next follows, clearly prove; such charge nevertheless will be entitled to consideration in the scale of circumstances attending each case. In *Brydges* v. *Phillips*, Sir *W. Grant*, in reference to this subject, observed, "that in that case there was no provision for the payment of funeral expenses, an omission which in some of the late cases had full as much weight given to it as it deserved, and it was perhaps true, as stated by Lord *Hardwicke*,(*m*) that it was more a *phrase of form* than indicating a settled intention, and that either the *insertion* or *omission* of it meant little."(*n*)

The case of *Brydges* v. *Phillips*(*o*) was to the following effect: Mr. *Brydges* having a daughter about four months old, devised all his real estates not included in his marriage settlement, and since purchased by him, to trustees, to sell a sufficient part of them and apply the produce, in the first place, in *payment of debts* (except a mortgage and charge,) and in the next place, to raise and pay 1000*l.* to his half sister, and 4000*l.* to his wife, to whom he devised for life his unsettled estates, and also his settled estates, if he died without leaving issue male, remainder to his daughter in tail, remainder to his two sisters in fee. He then settled, as *heir-looms*, *articles* of *personal* property for the use of his wife and the persons to succeed to his real estates; and, after giving to his father an annuity for life, which he charged upon the unsettled estates, and legacies to servants and to his trustees, which he directed to be paid *out of his personal estate*, not settled as heir-looms, he bequeathed the *residue* of his personal property to his *dear* wife, whom with his trustees he appointed executors. Sir *W. Grant*, M. R. determined, that the personal estate was the primary fund for paying the debts.

Although, in the last case, there was ample room to *conjecture*, that the testator intended his wife to take the personal estate free from incumbrance, in the nature of a specific legacy,(*p*) yet the intention was not so plainly shown as to authorize the Court to displace the general rule. Minute criticisms were afforded, which his Honour (in imitation of Lord *Thurlow* in *Ancaster* v. *Mayer*,(*q*)

(*m*) 2 Atk. 626. (*n*) 6 Ves. 570. (*o*) Ibid. 567.

(*p*) Where such a bequest failed to exempt the personal estate, see *Dolman* v. *Smith*, *ante*, p. 464. *Tait* v. Lord *Northwick*, *ante*, p. 469. *Hartley* v. *Hurle*, *ante*, p. 470. *Tower* v. *Rous*, *infra*, p. 473. and see *infra*, sub-div. 2.

(*q*) *Ante*, p. 466.

considered to be more liable to mislead than to assist in discovering the intention of the testator. It was the opinion of the Court, that neither the manner in which the real estates were given and charged, nor the mode in which the *residuary* personal fund was given, *viz.* after the bequests of the heir-looms and legacies (his Honour concurring in opinion with Lord *Rosslyn* in *Tait* v. Lord *Northwick*,)(*r*) was sufficient to exonerate the personal estate.

The next case determined by the same learned Judge, is an authority that, if a testator expressly charge his personal estate with debts of a particular description, *viz.* with those by simple contract, and then bequeath that fund, it will not be discharged from debts, &c. generally, for although there arise a *presumption* from such a partial charge, that other debts were meant to be excluded and cast upon the real estate, yet that presumption is not so clear and conclusive as to render the general rule inapplicable. It *alone* does not reach the standard of *plain* intention required by Lord *Thurlow* in *Ancaster* v. *Mayer*.

Accordingly in *Watson* v. *Brickwood*,(*s*) Mr. *Watson* devised his real estates to a trustee, &c. but beneficially to his two nephews, *William Wood* and *Richard Baker*, for life, with remainders over. He then gave legacies to his nieces, payable at the end of a year after his death, and bequeathed *all* his goods, chattels, personal estate, and effects, *not thereinbefore disposed of*, to his nephew *William*, "he paying thereout all legacies, funeral expenses, and simple contract debts." The testator then noticed his being indebted by *mortgages* and *bonds*, for money borrowed to pay for some of the estates he had purchased, and directed that *those debts* should be paid by the devisees of his real estates in equal proportions, in the manner he prescribed. After giving an annuity to a servant out of his real property, he appointed his nephew *William Wood* sole executor. It is observable, that the will does not charge the real estate with any of the debts; but the testator added a codicil, by which, after appointing a trustee in the place of the one named in the will, he empowered the new trustee, "in order to raise money for the payment of *all* his debts and legacies, to mortgage, with the approbation of the taker for the time being of his estates, a competent part of his freehold estates." Sir W. *Grant* was of opinion, upon the authority of *Tait* v. Lord *Northwick*,(*t*) that the personal estate was not exonerated in the present case.

The remarks which occur, on perusing the last case, are these; that the charge of debts *generally* upon the real estate, by the codicil, seems to destroy the implication that in charging the personalty by his will with those by simple contract only, the testator intended to exempt it from those by specialty. The manner in which the real estate is charged seems to prove this. It is directed to be mortgaged *in order* to raise money to pay *all* debts and legacies, *i. e.* to raise money, if necessary, in aid of the personal estate. That the real estate was to be the fund *first* liable to *all* those demands could not have been intended, since the personal estate was expressly given, subject to simple contract debts and all legacies. If then the real estate was clearly auxiliary to answer those demands, it would

(*r*) *Ante*, p. 469. (*s*) 9 Ves. 447. (*t*) *Ante*, p. 469.

have been too much for the Court, under the general charge upon the latter fund, to have made it *primarily* liable to the debts by specialty.

Sir *William Grant's* attention was again called to the present subject in *Tower* v. Lord *Rous*,(*u*) in which his decision was in conformity with the several authorities before stated.

In that case Mr. *Tower* devised his real estates, subject to the mortgages upon them, and to the payment of his *debts and legacies* to trustees for a term of 1000 years, remainder to his eldest son for life, remainder to the son's male children successively in tail male, with remainders over, directing his leasehold property to be settled in the same manner as his freehold estates, so far as the law would permit. The trusts of the term were to raise a portion for his eldest daughter, and to sell part of his freehold or copyhold estates to discharge mortgages, "and all his debts and legacies," and the testator declared, that, if he were entitled to any money *as personal estate*, charged upon any part of his real property before devised, it should be extinguished for the benefit of the persons entitled under the limitations in his will. The testator, after giving to his wife a legacy, and half of his plate and linen at *A.*, and the whole of his furniture at *B.*, the best of his carriages, two coach horses, and two saddle horses, bequeathed the residue of his personal estate to such one of his sons, as should at his death be his eldest son, and entitled to the possession of his devised freehold estates; and appointed his wife trustee, and the plaintiff his eldest son, executor. Sir *W. Grant* determined that the personal estate was first applicable to the satisfaction of debts and legacies.

The grounds of the decree appear to have been the following: 1st, Because there was nothing particular in charging the real estate, nor in declaring the trusts of the term, nor otherwise denoting the testator's intention to make the real property the *primary*, still less the exclusive fund for paying the debts and legacies: 2dly, because the bequest of the personal estate was no more than the ordinary residuary clause, commencing with the word "residue:" 3dly, because the residuary legatee could not take specifically what remained of the personalty, after separating the particular articles given to the widow, in consequence of the funeral and testamentary expenses to which it was liable, not being charged upon the real estate; an omission and liability that afforded an inference of the testator's intention not to give the personal fund as a specific legacy; and lastly, because, instead of the intent appearing to increase the personal estate, at the expense of the real, the contrary seemed to be the object, from the direction for the extinguishment of any personal demands the testator might have upon the lands for the benefit of the devisees, as also from the personal estate not being given to any one by name, but to such son of the testator as should be the eldest at his death and entitled to the real estates, a circumstance, which showed no special predilection for the person of the casual legatee, and therefore no particular motive for such a legatee taking the residue exempt from the natural charges to which it was liable. All these circumstances were in corroboration of the general rule,

(*u*) 18 Ves. 132.

according to which, debts and legacies were to be paid out of the personal estate in the first instance.

The reader will have discovered throughout the long line of cases which have been considered, how uniformly they support the rule of law, which subjects the personal estate, in the first place to the discharge of debts, legacies, funeral and testamentary expenses. We have seen that a mere bequest of the residuary personal estate, by the term "residue," or by the words "*all* my personal estate,"(*x*) or even after previous sums or articles were given out of it ;(*y*) and although the residue bequeathed, as of personal property "not otherwise disposed of"(*z*) were not *singly* sufficient to exempt that fund from its natural obligation to pay debts, &c.: also, that whether the real estate be *charged* with, or be given in *trust* to pay, debts and legacies, or a term of years be created for those purposes, still the *personal* estate must be *first* applied.(*a*) We have further seen, that neither the devise for payment of debts, &c. out of the *rents* of real estates ;(*b*) nor the mere *charge* of funeral expenses upon that fund,(*c*) or an *express charge* of only *some* of the debts upon the personalty,(*d*) will exempt the latter fund from its legal liability. Yet a testator may, if he please, give his personal estate as against his heir, or any other representative, discharged from the payment of his debts and legacies. The only question therefore is, what is the mode of expression sufficient to exempt that fund, when by the rule of law it is *first* liable? It was laid down in the case of *Fereyes* v. *Robertson*,(*e*) that *express words* of exemption were necessary ; and the same doctrine was asserted in *Dolman* v *Smith*.(*f*) But this sound rule has not been adopted in modern cases. Lord *Thurlow* considered, that "declaration plain," or "manifestation clear," upon the face of the will, was to stand in the place of express words,(*g*) terms explained by Lord *Alvanley* to mean "such an inference as left no doubt upon the mind of the person, who was to decide the question."(*h*) It is now settled that express words to exonerate the personal estate are not required, but that the fund will be exempted, if the intention of the testator in its favour can be collected from a sound interpretation, put upon the *whole* will.(*i*) The result is, that what the law had originally settled beyond the possibility of doubt and controversy, is now left without rule or standard to the *arbitrium* of every Judge, whose talents and perceptions being unequal, unanimity of opinion cannot be expected in all the determinations upon the present subject. It is not then one or two circumstances which will have the effect of exonerating the personal estate ; but if all the circumstances united leave *no doubt* in the mind of the Judge, (he paying proper respect to preceding authorities,) that the testator intended to exempt his personal estate, that intention will be effectual. It is therefore proposed to consider the cases, in which the personal estate was exempted in the first place from satisfying debts, &c. under the following title :

2. When the real estate will be considered the primary fund for the payment of debts and legacies.

(*x*) *Ante*. pp 463. 469. (*y*) *Ante*, pp. 464. 468. 469. 470. 473. (*z*) *Ante*, p. 470. (*a*) *Ante*, p. 466. (*b*) *Ante*, p. 470. (*c*) Ibid. pp. 467. 470. (*d*) *Ante*, p. 472. (*e*) Bumb. 310. (*f*) Pre. Ch. 458. (*g*) 1 Bro. C. C. 462. (*h*) 3 Ves. 113. (*i*) 4 Ves. 823. 9 Ves. 454. 1 Meriv. 219. 220.

The question in each particular case of exemption resolves itself into this: "Does there appear from the *whole* testamentary disposition *taken together*, an intention on the part of the testator so expressed, as to convince a judicial mind, that it was meant, not merely to *charge* the real estate, but so to charge it, as *to exempt* the personal? For it is not by an intention to charge the real, but by an intention to *discharge* the personal estates, that the question is to be decided.(*k*) By this test we shall examine the following cases, and endeavour to distinguish such as are properly decided from those which are not so determined.

In *Waise* v. *Whitfield*,(*l*) the testator devised lands to trustees to sell for payment of debts and legacies, and bequeathed to his wife the *residue* of his personal estate, to whom he also gave 600*l.* out of the produce from the sale of the trust estate. Lord *Harcourt*, C. was of opinion that the personal fund was exonerated from the above payments.

His Lordship's judgment was founded upon the additional gift of the 600*l.* as affording the *strongest presumption*, that the testator intended to give his wife the *whole* of his personal estate, not considering the amount of that fund sufficient for her.

The discharge of the personal estate in *Adams* v. *Meyrick*,(*m*) seems to have been founded upon the supposition, that the residuary personal estate, being preceded by a specific bequest of several chattels, the residue was also intended to be specifically given to the wife exempt from debts and legacies. But since such a residuary disposition may be equally considered, as importing nothing more than a bequest of the personal estate after satisfaction of debts and legacies, such a gift of the residue does not raise that plain and satisfactory inference of intention to discharge that fund, as is required by all other cases for the purpose of exempting the personal assets from their legal obligation.(*n*) This case therefore does not seem to be authority at the present time, that such a mode of bequeathing the residue will *alone* repel the general rule, although it may have that effect, when explained by the context of the will.(*o*)

The same remarks apply to the cases of *Wainright* v. *Bendlowes*, (*p*) *Anderton* v. *Cooke*,(*q*) and *Bicknel* v. *Page*,(*r*) which appear to have been decided on the like principle as the last case. Upon this point Lord *Eldon* observed, "all he could say upon it, was, that it was a *circumstance* deserving of just so much weight and no more, in the mind of any individual judge, as could at the time bring himself to consider it to be *fairly* entitled to."(*s*)

If then a residuary bequest preceded by legacies of specific chattels be insufficient of itself to discharge the personal estate from debts and legacies; it seems to be a natural consequence, that, where the personalty is given, without such exceptions, out of it, it will not be exonerated in the hands of the residuary legatee from debts, &c.; yet there are cases to the contrary, such as *Kynaston*

(*k*) 1 Meriv. 230. (*l*) 8 Vin. Abr. "Devise," 437. pl. 19.
(*m*) 1 Eq. Ca. Abr. 271. pl. 13. (*n*) See *ante*, p. 471. and the references there in note (*h*.) (*o*) 1 Meriv. 224. (*p*) 2 Vern. 718. Prc. Ch. 451 *S. C.*
(*q*) Cited 1 Bro. C. C. 457. (*r*) 2 Atk. 79. (*s*) 1 Meriv. 236. and see *Tower* v. *Rous*, *ante*, p. 473.

v. *Kynaston*,(*t*) *Holliday* v. *Bowman*,(*u*) and *Gaskill* v. *Hough*,(*x*) which appear to be over-ruled by other authorities.(*y*)

Under this *head* may be classed the case of the *Attorney General* v. *Barkam*,(*z*) in which the testator, for the performance of his will, and payment of *all* his debts, devised his real estate. And, as to his personal property, he gave it to his *executors*, to discharge his *funeral* expenses; which, if deficient for that purpose, he directed to be aided by the application of the first rents and profits of his real estate by his *executors* until *all* his debts, legacies and funeral expenses should be paid; and if there were any surplus of his personal estate, his *executors* were to pay it to his wife. The Court was of opinion, that the wife took the personal estate exonerated from debts.

The effect of the will just stated, appears to be simply this: The testator considering that his personal estate might be insufficient to pay all his debts and funeral expenses, charged his real estate with the former; providing, that if the personal fund should be deficient to pay his funeral expenses, they should be satisfied out of the rents of his lands, which he also subjected, in that event, to *all* his *legacies*, debts and funeral expenses; and if there happened to be a *surplus* of his personal estate, it was to be paid *by* his *executors* to his wife. It seems, therefore, that what was given to the wife was a mere *residue*, after payment of debts, legacies, and funeral expenses, and that the real estate was only intended as an auxiliary fund, or at least that the contrary intention is not so plain and manifest, as required by modern cases, to discharge the personal estate by *implication*.(*a*)

In *Stapleton* v. *Colvile*,(*b*) the testator gave to his wife for life his real estate, charged with two annuities and a legacy *empowering* her to raise, by mortgage or sale, sufficient money to pay his *debts*. And, after reciting the great satisfaction he had of his estate having continued so long in his name and family, and the great desire he had to perpetuate, so far as he could, his name and estate; he devised all his real estate, after his wife's death, to his nephew for life, remainder to his first and other sons successively in tail, &c. upon condition of their taking and using his name and arms for ever. At the conclusion of the will, the testator bequeathed all his goods, chattels, and personal estate to his wife, and appointed her executrix. Lord *Talbot* decreed, that the wife was entitled to the personal property discharged from debts.

His Lordship founded his judgment upon an inference of the testator's intention to give the personal estate specifically to the wife, presumed from his giving authority to her to dispose of the *inheritance* of the real estate to pay debts, in order to secure to her the full enjoyment of her interest for life in it, and of the personal estate absolutely free from all charges. This is certainly very flimsy reasoning, and, if deemed sufficient to exonerate the personal estate, it would destroy the authority of the cases stated in

(*t*) Stated 1 Bro. C. C. 457. in a note. (*u*) Cited 1 Bro. C. C. 145.
(*x*) Cited 3 Ves. 110.
(*y*) See *ante*, pp. 463. 464. *Samwell* v. *Wake*, *ante*, p. 465. and Lord *Thurlow's* observations, 1 Bro. C. C. 466. (*z*) Cited Forrest. 206.
(*a*) See *Tower* v. *Rous*, 18 Ves. 132. and *ante*, p. 473. (*b*) Forrest. 202.

the first subdivision of this section. Lord *Thurlow*, in commenting upon the case, observed, that the wife was executrix; and, exclusive of the context of the will, with regard to the option given her to charge *either* fund, there never was a *stronger case against charging the real estate;* for the testator gave the whole real estate to his wife, and to be charged with debts; he wished its continuance in his name and family, and yet *charged* it with payment of his debts.(*c*) That he meant to cast his debts upon the lands, in the first instance, was inconsistent with his anxiety to preserve his estate in his name and family. And Lord *Alvanley*, in allusion to this case, remarked, that "the circumstance laid hold of by Lord *Talbot*, *viz.* of the executor having the power to raise so much out of the estate as would be sufficient for the debts, did not satisfy his mind."(*d*) This case may, therefore, be considered, as not affording that clear indication of the testator's intention, which is sufficient to exonerate the personal estate from its legal obligation.

Lord *Hardwicke*, in *Walker* v. *Jackson*, thought the circumstance of the personal estate being expressly given by *codicil* to the *executrixes*, who were *trustees* of the real estate charged with debts, legacies, and funeral expenses, was sufficient to exonerate the personal fund. But, when it is remembered that the fact of trustees being also appointed executors, has been generally considered strong evidence against the exemption of the personal estate;(*e*) that the gift of the personal estate to *executors* instead of raising an inference of intention to bequeath it discharged from debts, &c. seems to afford a contrary implication,(*f*) and that, at the utmost, the disposition could only have the same effect, as if it had been made to other persons;(*g*) the opinion of Lord *Hardwicke* may be considered as open to objection.

In that case,(*h*) an estate in the county of *Lincoln* was given by the testator, to be sold by his executrixes, for the payment of debts, legacies, and funeral expenses; and he then appointed executrixes. In consequence of the same persons being appointed executrixes and *trustees*, Lord *Hardwicke* admitted, that, if the testator had proceeded no further, the personal estate would have been primarily liable to the debts, &c.; but then followed the *codicil*, giving to the executrixes all the personal estate not before devised. Upon this, his Lordship observed, that "a stronger circumstance could not be than the testator republishing his will and an alteration from what it was before; and, unless it were construed to be his intention to exempt the personal estate in favour of the executrixes, the words would be fruitless and vain, and did no more in their favour, than the will as it originally stood." He therefore concluded, that "these words could have no other signification than to exempt his personal estate."

In *Ancaster* v. *Mayer*, before stated,(*i*) Lord *Thurlow* criticised the above reasoning, remarked it was unsound, and that he entirely

(*c*) 1 Bro. C. C. 466. (*d*) 3 Ves. 110.
(*e*) *Vide Ancaster* v. *Mayer*, 1 Bro. C. C. 454. *ante*, p. 466. and *M'Clelland* v. *Shaw*, 2 Scho. & Lefroy, 538. 546.
(*f*) *Gray* v. *Minnethorpe*, 3 Ves. 103. *ante*. p. 467. (*g*) See cases stated *ante*, p. 443. *et seq.* (*h*) 2 Atk. 624. 1 Meriv. 222. (*i*) *Ante*, p. 446.

concurred with the principle laid down in *Stephenson* v. *Heathcote*,(*k*) *viz.* that the gift of the personal estate to a person who is appointed executor, is not to be considered as a legacy exempt from the payment of debts.(*l*) Lord *Eldon*, in *Bootle* v. *Blundell*,(*m*) thus stated his opinion as to the effect which ought to be given to the circumstance of the *trustees* of the lands charged with debts, &c. being appointed executors. "In *Ancaster* v. *Mayer*, as in many preceding cases, very considerable stress was laid on the circumstance of the persons who were appointed executors, being the same to whom the real estate had been before devised as trustees. In other cases, this circumstaace is considered as less material; but the *degree of weight*, to which it is entitled, depends upon the *whole* of the will taken together; and, if a distinction is to be discovered from the beginning to the end of the will, between what they are called upon to do in the character of executors, and what as trustees; and, if he (the testator) direct them as trustees, to do that which is properly the duty of executors, this is a circumstance which deserves also to be attended to, in determining what is the *manifest* general intention of the testator."

In the case of *Williams* v. The *Bishop of Landaff*,(*n*) Lord *Kenyon* considered the will to afford sufficient evidence of the testator's intention, to make his real estates the primary fund for the payment of debts, legacies, &c.

There, Mr. *Luther* being seised of estates in the counties of *Essex* and *Suffolk*, settled his estate in *Essex* with great care, directing the devisees to take his name as they severally succeeded to the enjoyment of it. His *Suffolk* estate he vested in trustees, to sell, and apply the money in *discharge* of his *debts*, *funeral expenses*, and the *several expenses* therein mentioned; and within a year after his death, to set apart 4000*l.* for the purposes therein expressed; and he declared, that if the estate *should be insufficient for these purposes*, the deficiency should be supplied out of the *Essex* estate. And, after giving specific and general legacies, the testator bequeathed *all* his ready money, &c. and *all other* his personal estate, not thereinbefore disposed of, to *Sarah Williams* absolutely. The question was, whether, under the above dispositions, the real estates were the primary funds for the discharge of debts, &c.? And Lord *Kenyon* determined in the affirmative.

The principle of the decision appears to have been, that the circumstance of having *first* devised one estate to pay debts, &c. and then another (which had been cautiously settled) if the former were deficient, before making any disposition of the personal property, and then disposing of the latter estate singly, and entirely, manifested a sufficiently clear intention that the real estates were designed to be charged with debts, &c. in preference to the personal estate, so as to entitle the residuary legatee to the *whole* of the latter fund as a specific legacy, exonerated from those demands; a right, which was not altered by the testator afterwards disposing of the *Suffolk* estate, since his Lordship held that the *Essex* estate must be applied and exhausted, before the personal was to be resorted to.

(*k*) Stated 1 Bro. C. C. 466. and 1 Eden. 38. (*l*) 1 Meriv. 224.
(*m*) 1 Meriv. 227. and see *M'Cleland* v. *Shaw*, stated *ante*, p. 467.
(*n*) 1 Cox. 254.

The decision of the same Judge in *Webb* v. *Jones*,(*o*) does not appear to be so well founded, as that in the preceding case; for there, real estates were devised to trustees to sell, and after payment of debts, legacies, &c. in trust to pay half of the net proceeds to *A.* and to invest the other moiety, on security, and apply the interest for the benefit of certain persons until they attained the ages of twenty-four; and then to divide the capital among them, but with benefit of survivorship upon the death of any before those periods. And the testator declared, that if all those persons died under twenty-four, "the moiety should sink into, and be deemed part of the *residue* of his personal estate;" which residue he bequeathed to two individuals in common, in the usual manner, and not in the nature of a specific legacy. Lord *Kenyon* held, that the personal estate was exonerated from the debts, &c. in consequence of the direction, that the residue of the purchase money of half of the real estate was to be added to the personal; a circumstance, which his Lordship conceived to be incompatible with the idea, that the personal estate should be applied in the first instance.

It seems to have escaped the observation of his Lordship, that the real proceeds being made part of the personal estate, must be subject to the same rule of construction as a bequest of the personal fund itself; which, being given as a *general residue*, afforded no inference of the testator's intention to exempt it from its legal obligations. The criticisms of Lord *Redesdale* upon this case settle its degree of weight and authority. "Except *Webb* v. *Jones*, (said his Lordship,) there is not, I apprehend, a single case, in which it has been held that personal estate was exempt from payment of debts, &c. without express words for the purpose; except where it has been given as a *specific legacy;* for, if it be given in terms, which do not imply that it was intended as a specific legacy, it is not held to be exempt from the charges, which the law imposes on it. Many cases have gone upon nice distinctions of the word "residue," whether it meant residue, after payment of debts and legacies, or residue, after taking out certain specific parts. But every specific legacy is exempt from debts, if there be a sufficient fund of any kind liable to them. For instance, if part of the personal estate be given as a specific legacy, and the real is left to descend to the heir, the personal not specifically given, is first applied; but the specific legatee is entitled to have the debts, which bind the heir, satisfied out of the real estate, so far as it will extend. The ground, therefore, of all the cases, *except Webb* v. *Jones*, has been, that the terms of the disposition, contained in the will, were either express, or such as to raise a presumption, that the testator meant to make the personal estate the subject of a specific bequest; and, therefore, not liable to debts, because specifically given as a legacy. Except that case, I know of none, where the personal estate, not given as a specific legacy, has been held exempt from the charges the law imposes on it, without express words denoting the intent (*p*)."

But when the personal fund is intended to be given as a specific legacy, it is not easy to determine, and is a question, upon which

(*o*) 1 Cox. 245. 2 Bro. C. C. 60. S. C. (*p*) 2 Scho. & Lefroy, 544.

Judges have differed in opinion. In *Burton* v. *Knowlton*,(*q*) Lord *Alvanley* decided, that the real estate was primarily liable to debts upon these grounds; that the *funeral expenses* being charged upon the lands, and the residuary personal estate given to the executor beneficially, in default of appointment by the testatrix, (he not being a trustee of the real;) and the personal estate, although given in the form of a residue, being, as he conceived, connected with preceding specific dispositions, were sufficient denotations of her intent to exonerate the personal fund, and to give it as a *specific legacy*.

Mrs. *Cockell* devised her freehold, copyhold, and leasehold estates to two trustees, in trust to make immediate sale, and to discharge with the proceeds all her debts and *funeral* expenses, also to invest the surplus in stock, and to apply the dividends and the rents of her unsold estates for the benefit of Mr. *Welch* for life, remainder to her heir at law; to whom she gave several articles of personal property. She then gave legacies; and 50*l.* to each *trustee* for his trouble, which she directed to be retained out of the trust premises; and after giving other legacies, the testatrix bequeathed the *residue* of her personal estate, not before specifically disposed of, to Mr. *Welch*, in trust to pay the same *as she should appoint*, and in default of appointment, she gave it to him for his own use, and appointed him *executor*. Upon the grounds before stated, Lord *Alvanley* determined that the real estate was the primary fund for the payment of debts. He remarked, that, although the words "funeral expenses" comprised in this trust, occurred in some of the cases, and were held not to have any considerable weight: yet that was, where the *trust fund* was given to the *executors*, to whom the personal estate was afterwards bequeathed; and he thought that, where the trust fund was given to *trustees* in such general words, who were *not* the *executors* upon whom the funeral expenses would naturally fall, it did afford a *considerable argument*, that the testatrix did not mean the personal estate to be the fund for all those charges, which naturally fall upon it. His Lordship also considered, that the residue was not given to Mr. *Welch as executor*, but beneficially; and relied upon the case of *Walker* v. *Jackson*, before stated. He also remarked, that the word "residue," being coupled with the expressions "not specifically bequeathed," showed the testatrix's meaning to be, not a residue after payment of debts, but after such parts of the personal estate as were not specifically given, *i. e.* in allusion to what she had before given to her heir, or to leasehold estates which she had bequeathed to the trustees.

This last decision was not satisfactory to Lord *Rosslyn*,(*r*) nor, as it seems, to Lord *Eldon*, who said he was not sure that the intention to exonerate the personal estate was quite so clear as Lord *Alvanley* took it to be.(*s*) If indeed it is settled, as it appears to be, that there is no difference whether the personal estate be given in express terms, or not, to a person who is named executor, since, as executor, he must in either case take it subject to the claims of individuals who are beneficially interested,(*t*) notwithstanding Lord *Hardwicke's*

(*q*) 3 Ves. 107. (*r*) See 4 Ves. 823. (*s*) 1 Meriv. 229.
(*t*) Ibid. 226. *et vide Ancaster* v. *Mayer*, 1 Bro. C. C. 454. *Stephenson* v. *Heathcoate*, 1 Eden, 38. 1 Meriv. 224. and *ante*, p. 466.

opinion in *Walker* v. *Jackson:* and, if the intention to exonerate the personal estate from its being given as *residue*, "not before specifically disposed of," may be considered ambiguous,(*u*) (since probably those words may have been inserted without particular meaning as mere customary expressions;) the case will amount to no more than an anxious charge of debts and funeral expenses upon the real estate, which has been shown to be insufficient to discharge the personal fund. And with respect to the inference arising from the funeral expenses being charged upon the real estate, Lord *Hardwicke* and Sir *W. Grant* are authorities for presuming, that no great weight is to be attributed to that circumstance.(*x*) Lord *Alvanley*, upon a subsequent occasion,(*y*) expressed his satisfaction with his decree; and the case, in consequence of what has fallen from Lords *Eldon* and *Rosslyn*, is an instance of the uncertainty which prevails upon the present subject.

The following is an authority in which almost every circumstance occurred which had been the subject of judicial observations in preceding cases, and upon which different Judges had formed different opinions as to their effect singly to exonerate the personal estate. Lord *Eldon*, after sound criticism upon every part of the will, determined, that the personal fund was primarily discharged from the payment of debts, &c.

In *Bootle* v. *Blundell*,(*z*) the case alluded to, the testator ordered his funeral expenses to be paid, and bequeathed to his two daughters legacies to be paid by his *executors*, and directed his said *funeral expenses* and legacies to be paid out of the money he might have at his death at *Ince* or the *Liverpool* bank, or due to him from the bank at the latter place, and out of rents and fines which should be then owing to him; and he gave the surplus of those funds among his children equally; to daughters for their separate uses; concluding that part of his will in observing, that he had already disposed of certain sums and securities for money, which he lately had by him; thus referring to the funds above appropriated, and making them the primary funds for the discharge of funeral expenses, and the sole funds for payment of those legacies. The testator then devised his manors of *Lostock* to trustees for five hundred years, to pay out of the rents and profits all his *debts*, and the *legacies* and *annuities* therein-*after* mentioned, or *to be* given by a codicil. He next gave legacies to his grandchildren, and 300*l.* to each of his *trustees* for their trouble. He also bequeathed several annuities; and, after declaring that his *trustees and executors* should not be answerable for losses, he ordered the *expenses* they might incur on that account to be *charges* on his *Lostock* estates, and to be paid out of their rents and profits, directing the term to cease after the completion of its trusts, and satisfaction of all the charges and expenses incident thereto. Here it is observable, that the legacies of 300*l.* are given to the trustees *qua* trustees, and are solely payable out of the *Lostock* estates. And although the *trustees* are also *executors* (a circumstance relied upon in preceding cases as an argument against the intention to exempt the personal estate,) yet that argument is destroyed when it is

(*u*) *Ante*, p. 470.
(*y*) 5 Ves. 545.
(*x*) *Ante*, p. 470. and see 4 Mad. 156.
(*z*) 1 Meriv. 193. 231.

remembered that this testator never uses the word "executors," but with reference to his personal property, nor the word "trustees," but in reference to his real estate. He has distinguished their offices, and treated their duties the same, as if his executors and trustees had been different persons. The circumstance also of directing the *expenses* of losses incurred "by his executors and trustees" to be paid out of the *Lostock* estates, raises a powerful inference of intention to exempt the personal estate; for when it is considered that such expenses as were incurred by them as *trustees* of the real estate could not have been charges on the personal estate, and that those expenses are blended with such as might arise from the office of executors, and the *whole* made charges upon the real property, it can scarcely be doubted but that it was meant to substitute the real in the place of the personal estate; and if, as to these expenses, it tends to confirm other circumstances in the will, not of themselves sufficiently clear to exempt that fund from debts, &c.(*a*) The testator then proceeded to declare, that, *subject* to the term and its trusts, the *Lostock* estates should go between his two daughters for their lives, with remainder to their respective children in strict settlement; and he directed, that so *soon* as his debts and legacies were discharged, and security given to the *trustees* for payment of the annuities and expenses, satisfactory to the annuitants, and *when* all expenses in the execution of the trusts respecting the term *and* of his will should be *fully* paid, the person then entitled to the *Lostock* estates should be let into *possession* of them. The will contained a power to appoint new trustees, or a new trustee, who was to receive 300*l.* out of the *rents* and *profits* of the estates comprised in the term; a material circumstance, since the *trustee* so to be appointed would *not* be an *executor;* whence the inference that the 300*l.* before given to each of the *trustees*, who were also *executors*, were so given for their trouble *as trustees*, and not *as executors*. The testator next proceeded to give his son other lands, called the *Lydia* estate, for life, with remainders over, which were neither charged with debts nor legacies; and having thus disposed of his real estates, without making any bequest of his general personal property, the testator proceeded to make disposition of it, giving to his son for life, with remainders over, specific parts of that fund, consisting of *curiosities*, to go as *heir-looms* with the estates last devised, intending them to be preserved for public inspection; a reason which accounted for their separation and exemption from debts, &c. without necessarily importing that the residue, which was afterwards given to his son, should be subject to those charges. The testator then gave to his housekeeper several specific articles of furniture, and other things, directing them to be removed by his executors with all convenient speed after his death, at the *expense* of his *personal* estate: a charge not necessarily implying that the debts and legacies should *also* be paid out of that fund. The testator next bequeathed to his son his household furniture, wines, &c. and personal estate "not thereinbefore specifically disposed of, or which thereafter might be disposed of by him;" a bequest, which, not being in the form of residue, and enumerating specific articles,

(*a*) 1 Meriv. 239.

had been considered by some Judges, though not by others, as raising an inference of intention to exonerate the personal estate. But Lord *Eldon* merely declared it a circumstance only to be taken into account in considering the contents of the whole will.(*b*) The testator added a codicil to his will, directing that any *expenses* which might be incurred from attempts to disappoint his *will* in any of its provisions should be paid out of the *Lydia* estate, devised to his son for life; and he created a term of 1000 years in it for that purpose: a direction showing, as previously in the will, an intent to exonerate the general personal fund, in ordering payment, out of the real estate, of *expenses* which the personal was primarily liable to discharge. Under all the circumstances, Lord *Eldon* expressed his conviction, that the testator intended to exempt his general personal estate from the payment of his debts; and so decreed.

The dispositions in the following will induced Sir *John Leach*, V. C., to determine that the real estate was *primarily* liable to the satisfaction of debts, &c.

In *Greene* v. *Greene*,(*c*) the testator began his will in giving to his wife, for *her own* and *sole use*,(*d*) *all* his ready money, securities for money, goods, chattels, and other personal estate and effects, except such parts of it as he by his will or a codicil should *specifically* dispose of. He then devised his real estates, subject to his debts and *funeral expenses*, to trustees, in trust to sell, and out of the proceeds to pay his debts, funeral expenses, and the *costs of proving his will;* and to lay out the surplus on securities, and pay the interest to his wife *for life;* and to distribute the capital, after her death, among her children by the testator, as therein mentioned; and he appointed his *wife and* the trustees *executors*. The Court held, that the personal estate was exonerated.

The prominent features of the last case appear to be, the mode in which the personal fund is given to the wife, and the manner of *devising* the real estate to the trustees; *viz.* subject to debts and funeral expenses. The personal estate is *first* bequeathed, and disposed of as a *whole*. So much only is to be deducted, as the testator may afterwards *specifically* bequeath: a circumstance entitled to some consideration, in discovering the testator's intention in regard to exempting the personal fund; and it seems to raise no slight inference in the present case, that he meant his wife to take the whole personal estate as a *specific* legacy. The weight to be attached to this single circumstance is increased by the testator directing his funeral expenses and the *costs of probate* to be paid out of the real estate; obligations naturally falling upon the personal fund. These circumstances seem to have convinced the Court of the testator's intention to exempt his personal estate. Sir *John Leach* thus expressed himself: "The direction that the trustees, who form only *a part* of the executorship, should, out of the produce by sale of the real estate, pay all debts and expenses, and after payment thereof invest the surplus for the benefit of the wife for life, with remainder to the children, when coupled with

(*b*) See *ante*, p. 475. (*c*) 4 Mad. 148.
(*d*) A limitation considered of importance by Lord *Alvanley*. See *Hartley* v. *Hurle*, *ante*, p. 470.

the circumstance, that the devise to the trustees is expressly made subject to the payment of debts and funeral expenses, and with the gift to the wife, *for her own sole* and absolute *use*, of all the testator's ready money, &c. does appear to me to convey a clear intimation of intention, not that the real estate should be auxiliary to the personal, but that the real estate should directly, and at all events, be applied as the primary fund for payment of the debts, funeral expenses, and the costs of the probate; and that the wife should take the personal assets exempt from those charges."(*e*)

The same Judge made a similar decision to the last upon nearly the like dispositions, in the case of *Michell* v. *Michell*.(*f*)

After having examined the preceding line of cases, rendered contradictory and difficult by a departure from the wholesome rule which required express words to exonerate the personal estate, the reader can scarcely avoid concluding, that the uncertainty in question on the present subject is such, as to render useless private opinion, and to induce the necessity of resorting, in almost every instance, to a court of equity: and, even then, so little uniformity of decision is to be expected, that judgments can seldom prove satisfactory. There can be but one opinion respecting the inconveniences attendant upon such uncertainty; and since the Courts are now restrained by later decisions, from reverting to the ancient rule, the present appears to be one among other instances wherein it might be expedient to call in the aid of a competent tribunal to remedy the evil. The confusion prevailing in the cases is thus described by Lord *Eldon:* "Upon looking through the several cases, which have been decided during the period of more than a century past, I think I should have been authorized to say, at the commencement of it, that if such a rule were laid down, (*viz.* that the intent to exempt the personal estate must be manifested in such a manner, as that persons out of Court, on reading the will, could not fail to agree that such was the intention,) there could never, in all human probability, be any decision upon a will furnishing a solution of the question, and now at the close of it, I think I am authorized to say, that, which it was *then* probable would be the fact, is the fact, *for*, on a comparison of all the cases which have arisen, it is scarcely possible to find any two, in which the Court altogether agrees with itself; there being scarcely a single circumstance that is considered, in one case, as a ground of inference in favour of the intention, but it is considered in other cases, as against the same inference; and I can find no rule deducible from all that has been said on the subject, but this (which appears to be a rule supported by all the cases taken together) namely, that *since* it has been laid down that *express* words are not necessary to exempt the personal estate, there must be in the will that which is sometimes denominated 'evident demonstration,' sometimes 'plain intention,' and 'necessary implication,' to operate that exemption. Thus much can be collected from the cases; but when it is further inquired as to what it is that constitutes this evident demonstration, plain intention, or necessary implication, it appears to me that Lord *Alvanley* is right when he says, you are not to rest on conjecture; but the mind of the Judge must be convinced that

(*e*) See *Dixon* v. *Dawson*, 2 Sim & Stu. 327. (*f*) 5 Mad. 69.

he is deciding according to what the testator intended.(*g*) The expression 'necessary implication,' is frequently applied to cases between a devisee and heir at law, and yet there is hardly a case decided against an heir at law, where the implication upon which it was so decided was of absolute necessity. It is but a *loose* way of defining this expression to say, that the intention must be so probable that the judge cannot suppose the contrary; and it seems *strange* to lay down as a rule, that express words shall not be required, but yet that there must be expressions tantamount to express words. I take it that this is what will be found to be the result of *all* the cases; that the Judge is, in *every* instance, to look at the *whole* of the will together, and then ask himself whether he is *convinced* that it was the testator's intention to exempt his personal estate." "Then, on the question, whether the personal estate is discharged or not, I apprehend it will be found that the very *same* circumstances have, in the minds of *different* Judges, led to different conclusions. And this is the result to be drawn from the most diligent comparision of all the cases."(*h*)

3. The amount of the personal estate in comparison with the debts, &c. is not to be considered in forming an opinion of the testator's intention to exonerate it. Ancient cases seem to have sanctioned an inquiry into that fund, in order to deduce from the result an inference of intention to exempt it from its legal obligations;(*i*) and the debts exceeding the whole of the personalty appear to have been the foundation of the decree in *Bamfield* v. *Wyndham*,(*k*) exonerating the personal estate. But an inquiry into the state of that fund is exploded by modern authorities. The testator's intention is to be collected from his will alone. In Lord *Inchiquin* v. *French*,(*l*) Lord *Hardwicke* cites, with approbation, the *dictum* of Lord *Holt*, that the Court ought not to consider the circumstances of the testator in ascertaining what was his intention. So in *Stephenson* v. *Heathcote*,(*m*) Lord *Northington* would neither admit *parol evidence* of the testator's intention to exempt the personal estate, nor permit an inquiry into the amount of that fund, for the purpose of showing directly or inferentially an intent to exempt it from debts, &c. In *Brummel* v. *Prothero*,(*n*) Lord *Alvanley* declared, that in endeavouring to ascertain the testator's intention, he would not look out of the will to the state of the testator's property. And in *Bootle* v. *Blundell*,(*o*) Lord *Eldon* considered it as settled at law and in equity, that the circumstances of the personal estate, whatever they might be, would not alter or vary the rule, which made the personalty the primary fund for payment of debts, &c.

4. Questions may arise, not as to the exemption of the personal estate from debts and legacies *generally*, but whether a *particular* legacy is or is not payable out of the real estate, in the first instance, although the will contain a general charge of legacies upon that estate, which would make it the *auxiliary*, not the primary, fund for the payment of legacies generally. It is therefore proposed to consider—

(*g*) 3 Ves. 113. (*h*) 1 Meriv. 219.
(*i*) See Lord *Talbot's* observations, Forrest, 208. (*k*) Pre. Ch. 101.
(*l*) Ambl. 40. 1 Cox, 9. (*m*) 1 Eden, 39. 43. (*n*) 3 Ves. 113. (*o*) 1 Meriv. 220.

First. When the real estate will be the primary fund to answer one or more legacies, although as to others it is only liable in aid of the personal estate.(*p*)

In order to make the real estate the primary fund for the discharge of particular legacies, the intention of testators is to be collected in the same manner as upon questions whether the personal estate is exonerated from legacies generally. When therefore a testator plainly shows, upon a sound interpretation of the whole of his will, that one or more debts or legacies should be paid out of his real estate in the first instance, his personal estate will be exempted, notwithstanding there be a charge of legacies generally upon the real property, by which it would be only an auxiliary fund for the discharge of those other legacies, in the event of a deficiency of the personal estate. This will appear from the following cases:

In *Phipps* v. *Annesley*,(*q*) the testator devised his real estate to trustees for the payment of all his debts and legacies, with remainder to his nephew. He then gave a legacy of 3000*l.* to his only daughter at the age of eighteen, or marriage, (in addition to 12,000*l.* already charged by settlement upon the real estate,) which he directed his trustees to raise by sale or mortgage of his lands *with* his personal property; but declared, "that the money should not be raised till eighteen or marriage, *out* of the before mentioned estate or land, that it might not be a debt upon his personal estate;" and he thrice expressed in his will, "that his lands were devised to pay his debts, and *all* his legacies, in case his personal estate should not be sufficient." Lord *Hardwicke* determined that the real estate was *primarily* liable to the legacy of 3000*l.*

His Lordship considered, that the intention to exempt the personalty from the legacy of 3000*l.* appeared in the gift of that sum, in *addition* to and *connection* with the 12,000*l* then a subsisting charge on the land,(*r*) which circumstance, coupled with the devise of the less sum out of the real estate, and the declaration that *it should not be a debt upon the personalty*, was conviction to his Lordship's mind, that the real property was meant to be *primarily* liable to this legacy; notwithstanding it was only the *auxiliary* fund for the payment of debts and the other legacies.

It seems to be a necessary consequence, that if a subsisting charge on the real estate, augmented by will, shall have the effect of attracting to it the testamentary addition, so as to make it primarily payable out of the land, the principle of the decision must produce a similar determination where the charge so subsisting is revocable, with a power to limit new uses of the estate; and revocation of the instrument creating the charge is made by a will, disposing of the property, but expressed to be *subject* to payment of the money mentioned in the charge; for in such a case it is obvious that the lands primarily liable to raise the sum were, notwithstanding the revocation of the old uses, intended by the testator to continue the primary fund for its discharge. This was the ground of Lord *Kenyon's* decree in the following case:

(*p*) *Vide* sect. 1. p. 446. (*q*) 2 Atk. 57.

(*r*) Such also was the case of *Ward* v. Lord *Dudley*, determined by Lord *Thurlow*, 2 Bro. C. C. 316 1 Cox. 438.

The Earl of *Bath* being entitled to the remainder in fee of real property, expectant upon an estate tail in *A.* conveyed by proper deeds that remainder to trustees, to the use of himself for life, remainder to the trustees for a term of ninety-nine years, in trust to raise so much money for such persons as he should appoint by deed or will, with liberty to revoke the old and appoint new uses. The Earl, in execution of his power, made an appointment by deed, directing his trustees to raise 2000*l.* within a year after the determination of the estate tail in *A.* and the term should commence in possession, and to pay that sum to *B.* The Earl *covenanted* to pay the money to *B.* within the same period after the remainder came to him, in the event of *A.'s* estate tail determining during his (the Earl's) life: or, if that contingency should not happen, and the Earl revoked the uses of the first deed, so that the trustees could not raise the 2000*l.* then he *covenanted* that his heirs, &c. should pay the money to *B.* within a year after the expiration of the estate tail, provided if *A.* barred the remainder, the 2000*l.* was not to be paid. The Earl totally revoked the uses of the first deed by his will, and disposed of the real property, "*subject* to the payment of the *aforesaid* sum of 2000*l. charged* thereon by him for the benefit of *B.*" Lord *Kenyon*, M. R. determined, upon the reasoning before mentioned, that the money was to be paid out of the real estate.(*s*)

In *Spurway* v. *Glynn*,(*t*) Mr. *Coffin* after *charging* particular real estates with the payment of debts, funeral, and testamentary expenses, and the *legacies after* bequeathed, or which he should give by codicil, devised all his real estates (*except* his *Portledge* estate, which he afterwards meant to dispose of) to Messrs. *Glynn* and *Prideaux*, equally in fee. He then devised the *Portledge* estate to trustees, in trust by sale or mortgage, or out of the rents and profits, to raise, with all convenient speed after his death, 400*l.* and pay the money to Mr. *Spurway*, and *after* such payment in trust for Mr. *Pine* for life, with remainders over. The testator then gave some legacies and annuities, and directed the *residue* of his personal estate not before specifically bequeathed, and *after* payment of his said legacies, to be converted into money, and applied by his executors in discharge of his debts, funeral, and testamentary expenses, and the *legacies* thereby given or which he intended to give by codicil, in *exoneration* of his real estates charged with them; and if, after such payments, there remained a residue, he gave it to Messrs. *Glynn* and *Prideaux*, whom he appointed executors. Sir *W. Grant*, M. R. was of opinion, that the *Portledge* estate was primarily, and solely, liable to the legacy of 400*l.*

His Honour said, that it was the testator's intention to charge the above sum *exclusively* upon the *Portledge* estate, in exemption of the personalty; for there was *no direct* bequest of the money to the legatee, but it was ordered to be raised out of the *Portledge* estate, and paid to him; and that the general words at the close of the will clearly related to the *first* charge, and were intended to exonerate the estates *there* referred to, in which the *Portledge* estate was expressly excepted.

(*s*) *Wilson* v. Earl of *Darlington*, 1 Cox. 172.
(*t*) 9 Ves. 483. and see sect. 1. p. 446.

Sir *William Grant*, M. R. made a similar decree in *Hancox* v. *Abbey*,(*v*) under the following circumstances:

In that case, Mr. *Hancox*, having a wife and two daughters, devised his real estates to trustees, to sell a part with all convenient dispatch after his death, and to discharge out of the money a mortgage debt affecting one of them, and to raise 2000*l.* for his daughters, payable at twenty-one or marriage; with a direction to his trustees, that so soon as the legacy was *raised*, it should be invested in stock, and the dividends applied for the maintenance of his daughters. And *after* the sale, and the application of the purchase money, for the *purposes aforesaid*, he devised the *residue* of the said estates to his wife for life, with remainder to his daughters as tenants in common in fee. The testator gave some legacies, and bequeathed his residuary personal estate, after payment of all his debts, *legacies*, and funeral expenses, to his wife absolutely. Sir *W. Grant* decided, that the personal fund was exonerated from its original liability to discharge the mortgage debt, and the legacy of 2000*l.*

With respect to the legacy, the reasons for his Honour's decree appear to have been these: 1st, That the 2000*l.* was not bequeathed as a *gross* sum, but as so much of the produce of the real estates; a devise, which entitled the daughters to the money in no other shape than as part of the real proceeds;(*u*) and 2dly, that the testator showed his intention, that the money should be raised solely out of the land; from the several directions which he gave as to the payment of the interest and the capital, none of which were applicable to a *sum* of 2000*l.* generally, but all to the sum of 2000*l.* with the circumstances previously stated, *viz.* a sum arising in consequence of the sale of real estate, and produced by that sale.

So in *Gittins* v. *Steele*,(*x*) where Lord *Eldon* reversed the decree of Sir *John Leach*, V. C.; the case was, that Mr. *Evans*, after directing his executors to pay his debts, funeral expenses, and the costs of proving his will, bequeathed 7000*l.* equally among his cousins, and *charged* his real property with the payment of that sum. He then gave to persons, whom he appointed executors, two specific sums of 8000*l.* and 2000*l.* three *per cent.* stock, then standing in his name, upon certain trusts, and after giving several legacies out of his residuary estate, he devised to the same persons, as *trustees*, all his real property to sell, and out of the proceeds and intermediate rents to pay his debts, funeral expenses, the 7000*l.* and the expenses of the sale. He then bequeathed all his money, securities for money, stock in trade, and the residue of his personal estate (not before disposed of) to his executors and trustees in trust, to sell his stock in trade, &c. and out of the produce, and his other money and securities, to pay the said legacies of 8000*l.* and 2000*l.* stock, and the several other legacies before given, *except* that of 7000*l.* which was to be considered as a *charge* upon, and *paid out* of the proceeds from the sale of the real estate. The testator then directed the *residue* of the money produced from the sale of his real property, stock in trade, and personal estate, and the residue of his other personalty, to be invested on securities for a limited period; and after providing, out of the interest, for the payment of certain weekly sums, he gave

(*v*) 11 Ves. 179. (*u*) See *Walker* v. *Pink*, cited 1 Cox, 5. (*x*) 1 Swanst, 24.

the surplus interest, and also the capital after the period before alluded to, for the benefit of the persons, who should be entitled to the said three legacies of 7000*l.*, 8000*l.*, and 2000*l.* Lord *Eldon* determined, that the real estate was the primary and sole fund for discharging the legacy of 7000*l.* and that the produce of it being insufficient to pay the whole sum, the legatee was not entitled to resort to the general personal assets to supply the deficiency.

The last is a stronger case in favour of exempting the personal estate from the particular legacy by negative words, than *Phipps* v. *Annesley*, before stated.(*u*) In addition to the whole frame of the will, manifesting the testator's meaning that the bequest should only take effect out of the proceeds from a sale of his real estates, he *expressly* exempts his personal property from the payment, declaring that the legacy was to be considered as a *charge* upon and *to be paid* out of those real proceeds. After such an explicit declaration, it would seem, that had other passages in the will raised a doubt as to the intention, it ought not to have been regarded; since, according to Lord *Hardwicke* in *Inchiquin* v. *French*,(*x*) where there are express words, they cannot be over-ruled by *implication*.

We shall proceed to consider—

SECONDLY.—When the personal estate will be exempted from debts secured by mortgages upon the real property.

It is a general rule, that the heir or devisee of an estate liable to a mortgage debt contracted by the testator, is entitled to have the land exonerated by the general personal assets;(*y*) because the money, being a debt due from the testator, is like his other debts, primarily payable out of the personal estate; and it is immaterial, whether he convenanted to pay the money or not, it being in either case equally his debt.(*z*) But these two circumstances must concur to entitle the real property to exoneration, *viz.* the debt must be of the testator's contracting, except under special circumstances; and it must not appear that he intended to pass the estate *cum onere*.

The principal authorities, where the personal estate was adjudged to be *primarily* liable to discharge the real from incumbrances with which it was charged, will be found in note.(*a*)

And although the testator devise his real estates charged with, or to be sold to pay, *all* his debts, yet, as that circumstance alone will not (as we have seen) exempt the personal assets from the obligation to discharge those demands, the personal estate will, in the first instance, be applicable to pay a debt by mortgage, as one of them.(*b*)

So also, if the real estate be devised to a person, *expressly subject* to mortgages affecting it; still the personalty will not be exempted from payment of them, because the testator's intention, by those expressions, to cast the burthen of those debts upon the devisee, so as to deprive him of his equity to resort to the personal estate for ex-

(*u*) *Ante*, p. 486. 2 Atk. 57.
(*x*) *Ante*, p. 465.
(*y*) 11 Ves. 186.
(*z*) 1 Ves. sen. 99.
(*a*) *Meynell* v. *Howard*, Pre. Ch. 61. *Howel* v. *Price*, 1 P. Will. 291. Pre. Ch. 423. 477. *S. C.* *Cope* v. *Cope*, 2 Salk. 449. *Bateman* v. *Bateman*, 1 Atk. 421. ed. by Sanders. *Lanoy* v. *Athol*, 2 Atk. 444. Lord *Portsmouth* v. Lady *Suffolk*, 1 Ves. sen. 31. *King* v. *King*, 3 P. Will. 358.
(*b*) 11 Ves. 186. and see *Hale* v. *Cox*, *infra*, as to the mortgage of the houses in *Piper Row*. Also *Lawson* v. *Hudson*, 1 Bro. C. C. 58. 3 Bro. Parl. Ca. 424.

oneration, is not clear and unequivocal. He might mean nothing more than to pass the estate, as the law would have done, in the absence of the explanatory expressions, *i. e.* subject to the mortgages; in which case, the right of the devisee against the personal estate would remain unaffected.(*c*)

But where a testator's intention is plainly shown to make the devised estate the *primary* fund for payment of incumbrances affecting it, the devisee must take it *cum onere;* and the personal estate will be discharged. This may happen, when a testator expressly devises a portion of the proceeds from a sale of his real estate to be applied in discharge of a particular incumbrance charged upon a part of it; for he could have no other motive in giving such a direction, than that the money to be raised by means of the real estate should be first applied in payment of the particular debt.(*d*)

The personal estate would be also exonerated, when the real is not given to the devisee till *after* a sale, and the proceeds have been applied in discharging incumbrances upon the lands or some of them; because, what is devised, is not the *whole*, but so much of the real property or produce as *remained*, after those purposes have been answered.(*e*) To give him, therefore, the *whole* of the estate, by discharging the mortgages out of the personalty, would be contrary to the terms of the will.

Thus in *Hale* v. *Cox*,(*f*) the testator had mortgaged one estate called *Milstones* to a Mr. *Robins*, for 300*l.*, and some houses in *Piper Row*, *Wolverhampton*, to another person. Under these circumstances, the testator directed the latter mortgage, and *all* his debts and funeral expenses to be paid out of his *personal* estate, bequeathing to trustees the residue of that fund for the benefit of two persons, *who died before* him. All his other real estates, (including *Milstones* in mortgage to *Robins*) he devised to the same trustees, in trust to sell such of them as should be *in mortgage* at his death, and *after* payment of principal and interest, he ordered the surplus to be invested upon securities, for the benefit of his daughter for life, with remainder to her children. The trustees were authorized, in their discretion, to continue the money on the mortgage, or borrow money on a transfer of the security. Although Lord *Thurlow* decided the case against the exemption of the personal estate, in consequence of the death of the residuary legatees during the testator's life, yet he was of opinion, that if such accident had not happened, the estate in mortgage to *Robins* must have been the primary fund for discharging that debt, there being no beneficial devise of its produce until *after* that event. But as to the other mortgage, he considered there was not sufficient evidence of intention, to exempt the personal fund from its natural obligation to exonerate the pledged estate.

The above opinion of Lord *Thurlow* in regard to the *primary* liability of the real estate to discharge the mortgage debt due to *Robins*, was afterwards confirmed by Sir *W. Grant*, M. R. in the

(*c*) So stated in argument, and admitted by Sir *W. Grant*, 11 Ves. 181. 188. and see 8 Ves. 306.

(*d*) 11 Ves. 186. and see *Watson* v. *Brickwood*, *ante*, p. 472. in exception, under the particular terms and construction of the will, 9 Ves. 455.

(*e*) 11 Ves. 187. (*f*) 3 Bro. C. C. 322.

case of *Hancox* v. *Abbey*, before in part stated,(*g*) who decreed that the devise to trustees of the real estates, in trust, out of the proceeds from a sale of part of them, to pay a mortgage debt secured upon the testator's lands at *Hanwell*, with a disposition of the rents, &c. of the unsold estates *after* the sale, and the application of the purchase money for the purposes therein mentioned (one of which was to discharge the debt by mortgage,) constituted the real estate the *original* fund for the payment of that debt.(*h*)

When indeed a testator has *in words* exempted his personal estate from particular debts, they cannot be controlled by *implication*.(*i*) Suppose then a testator to devise part of his real property to trustees to sell, and with the proceeds to discharge a mortgage upon another estate, and particular debts mentioned in a schedule to his will; and then to settle the remainder of his lands, including those subject to the mortgage, upon his wife and family; at the same time bequeathing to his wife, all his personal estate fully exonerated from his debts therein, and in the schedule enumerated, and from his debts and funeral expenses. If in the case supposed, the trust estate be insufficient to satisfy those demands, the settled estates must be applied in exoneration of the personalty; because, whatever may be the presumption of a contrary intention, it cannot stand in competition, with the express exemption of the personal property.(*k*)

The heir or devisee of a mortgaged estate will also be precluded from resorting to the persoal assets of the ancestor or testator for exoneration, when the debt is not contracted by such ancestor or testator; but the estate will come into his hands with the charge upon it. This is exemplified in the recent case of *Scott* v. *Beecher* and wife.(*l*) In that case *John Tyson*, having surrendered his copyhold estate to *Richard Mills* and his heirs, by way of mortgage, for securing 1000*l.* by his will devised all his estate and effects to his wife *Elizabeth Tyson*, and in particular his copyhold estate, and appointed her executrix. After the testator's death in 1814, *Elizabeth Tyson* proved the will, was admitted to the copyhold subject to the mortgage, and in 1816 died without issue, and intestate, leaving her brother, the plaintiff, her heir at law, according to the custom. Letters of administration were granted to the plaintiff, and to the wife of the defendant. Upon the question between the heir at law and administrator of *Elizabeth Tyson*, whether the former should take the estate subject to the mortgage, or have it discharged out of the personal estate of *Elizabeth Tyson*, the Vice Chancellor remarked, that *Elizabeth Tyson* was devisee of the copyhold estate, and was also residuary legatee and executrix of the mortgagor. If she had thought fit, she might have paid off the mortgage out of the personal estate of her husband; for it was admitted that she possessed assets sufficient to pay all the debts including the mortgage, and it might therefore be said that she elected to continue the mortgage as a charge on her real estate. But his Honour apprehended that that was not a case, in which a personal representative was bound to make out any such fact of election. By the gift to her as residuary legatee, the personal estate of *James Tyson* became her

(*g*) *Ante*, p. 488. (*h*) See 11 Ves. 179, 186. (*i*) See *ante*, p. 465.
(*k*) See the case of *Morrow* v. *Bush*, 1 Cox, 185. (*l*) 5 Madd. 96.

personal estate; but the mortgage debt of *James Tyson* was not her debt, and her heir, therefore, had no equity to pay off the mortgage out of her personal estate. The bill was accordingly dismissed with costs.

The same rule holds although there be a general charge of debts upon all the testator's real property, because such an incumbrance is not considered to be his debt, payable *primarily* out of *his* personal estate. And if it be not his debt originally, it will not, in general, acquire that character by his *covenant* to pay the money, so as to make his personal estate the *primary* fund for satisfaction of the demand; for such a covenant is merely auxiliary, an indispensible accident to subsequent transactions, consequent upon the creation of the original debt. Suppose then a testator to have acquired an estate, either as heir, devisee, or purchaser, subject to a mortgage; and upon a transfer of the security to have covenanted to pay the debt; in neither instance would his personal assets be answerable, in the first place, to satisfy the demand, they could only be resorted to in aid of the charged estate. This may be considered as the general rule, established by the cases referred to in note;(*m*) a rule, which will not be departed from, although the testator may have pledged his own estate as an *ulterior security* for the same debt;(*n*) since the debt remains unaltered, and the security is merely *collateral* to it.

And upon the same principle, if the testator's heir or devisee make an additional mortgage of the estate to pay the debts of the testator, and the money is so applied, or if he enter into personal obligations to individuals having claims or liens upon the land, such mortgage or obligations will not, as between the real and personal representatives of the heir or devisee, entitle the former to call for exoneration out of the personal estate: for that fund received no accession or benefit from those transactions, which, having been entered into in respect of the real estate, it seems but reasonable, that such estate should be the *primary* fund liable to answer them.

Accordingly, if an estate be devised to trustees to sell to pay debts and legacies, and, subject thereto, in trust for *B.*, should *B.* give a bond, or other security, to a legatee or creditor for payment of his demand upon the lands and die; those lands will be the *primary* fund for discharging the obligation.(*o*)

The principle, which governs cases of this description is well expressed by Sir *W. Grant*, in his comments upon *Billinghurst* v. *Walker*.(*p*) There a term of ninety-nine years was created to se-

(*m*) 1st. Where the covenant was entered into upon a transfer of the security, *Bagot* v. *Oughton*, 1 P. Will. 347. *Evelyn* v. *Evelyn*, 2 P. Will. 663. *Shafto* v. *Shafto*, 2 P. Will. 664. ed. by Cox, in notes. 1 Cox, 207. *S. C.* 3 Ves. 131. *Perkyns* v. *Bayntun*, 2 P. Will. 664. ed. by Cox, in notes.

2nd. Where the testator purchased the equity of redemption, and covenanted to pay the money; *Forrester* v. *Leigh*, Ambl. 171. 173. 2 P. Will. 664. ed. by Cox, in notes. *Ancaster* v. *Mayer*, 1 Bro. C. C. 454. 464. *Tweddell* v. *Tweddell*, 2 Bro. C. C. 101. 152. Commented upon by Sir *W. Grant*, 14 Ves. 424.

(*n*) 1 Bro. C. C. 464.

(*o*) *Basset* v. *Percival*, 2 P. Will. 665. ed. by Cox, in notes. Earl of *Tankerville* v. *Fawcet*, 1 Cox, 237. 2 Bro. C. C. 57. *S. C.* *Hamilton* v. *Worley*, 2 Ves. jun. 62. *Mattheson* v *Hardwicke*, 2 P. Will. 665. in notes. 5th ed. by Cox.

(*p*) 2 Bro. C. C. 604.

cure to *Martha Vernon*, 2200*l.* upon premises held for lives. There being a difficulty about the renewal of the lease, it was apprehended that *Martha* would remain altogether without a security if the lease expired. A bond, therefore, was given by *George Woodroffe*, the devisee of the estate, subject to the charge, for the money; which, if that apprehension proved well founded, would be the only security in existence for the debt. The lease was afterwards renewed, and the charge attached upon: Lord *Thurlow* holding, that the bond did not make the money charged upon the estate the personal debt of the obligor.

Upon the last case, Sir *W. Grant* made the following remarks: It is clear from the *res gestæ*, that all, which *George Woodroffe* meant, was, to substitute his bond in the room of the leasehold security; which, it was supposed, *Martha* was about to lose, but not to take upon himself, absolutely, and at all events, the debt, as a *personal* debt of *his own*. He had no intention absolutely to exonerate the estate; for he never would have given the bond except for the particular purpose. It was therefore inequitable, and unconscientious to say, that although the bond was given only for that purpose, it should be held to attach solely upon the personal estate of *George Woodroffe*. The *bonâ fides* of the transaction required that, in the event which happened, the lease should be still chargeable, and not the personal estate of *George Woodroffe*."(*q*)

So also, if the incumbered estate be further mortgaged by the heir or devisee for *his own* debt; the consequence must be, from the principle we have been discussing, that so much of the debt, as was contracted beneficially for himself, will be first payable out of his personal estate, and the remainder out of the descended or devised estate.(*r*)

And when the personalty has been erroneously applied as the *primary* fund, in exoneration of the real, the individuals entitled to the personal property will have a right to be reimbursed out of the real estate.(*s*)

5. The rule however making the real estate the primary fund for payment of an incumbrance affecting it, which was not contracted by the owner of the property, is not so inflexible as to admit of no exception, when the transaction imports his intention to adopt the debt as his own, and that he meant the vendor to be entirely released from it. This may happen, where upon the sale of an estate subjected to a mortgage, the purchaser not only contracts with the vendor for the equity of redemption, but also with the mortgagee for the legal interest upon redemption, covenanting at the same time to pay the money, and the mortgagee releases the vendor from the debt. In such a case, the intention of all necessary parties for changing the nature of the debt is apparent. It therefore becomes the personal obligation of the purchaser, and, as such, his personal assets are applicable to discharge it in exoneration of the real estate. Upon this principle, the following cases were determined.

(*q*) 14 Ves. 425.
(*r*) *Leman* v. *Newnham*, 1 Ves. sen. 51. and for the decree, see Belt's Supp. 40.
(*s*) *Lawson* v. *Hudson*, 1 Bro. C. C. 58. 3 Bro. Parl. Ca. 424. 8vo. ed.

In *Woods* v. *Huntingford*,(*t*) Mr. and Mrs. *Huntingford*, being tenants for life of real estates, with remainder in fee to their son *John*, joined with him in a mortgage of part of the lands for a term of years, vested in a trustee, to one *Carter*, in consideration of 200*l.* which was received by *John*, and applied to his own use; and the father and son *covenanted* for payment of the money. *Carter* transferred the mortgage to one *Betts*, who assigned it to Mr. *Wright*; to which transaction the mortgagors were parties, the father and son *covenanting* for payment of the money, which was increased by an advance of 100*l.*; and against the discharge of those debts and interest the son covenanted to indemnify the life estates of his father and mother. After this, the interest having become in arrear, and continuing unpaid for a considerable time, the son was desirous of being discharged from his liability to pay the debt and the interest in arrear which, with the interest to accrue before his remainder in fee would, in probability fall into possession, might amount to the value of his inheritance in the estate; he therefore contracted with his father to sell to him all his interest in the mortgaged estate, in consideration of the *father taking upon himself* the payment of the debt, and the interest as well in arrear, as to accrue, and *indemnifying* him (the son) from such payment. The transaction was effectuated by a proper deed in the year 1767, reciting those facts, and containing the usual covenants by the son for further assurance and indemnity. The trustee also was directed to stand seised to the use of the father, who *covenanted* to pay all the arrears of interest. The father afterwards borrowed of *Wright* a further sum of 40*l.* upon which occasion a *new* mortgage was made of the lands for that sum, together with the old debt of 300*l.* Under the above circumstances, Lord *Alvanley* was of opinion, that the father adopted the debt of the son as his own, which entitled the father's heir to exoneration of the pledged estate out of personal assets of the father.

It is observable in the last case, that the transaction in 1767 clearly showed that, as between father and son, the former meant to substitute himself in the place of the latter, in relation to the mortgagee. And with respect to the mortgagee, he also released the son from his liability by accepting the *new* mortgage for the old debt.(*u*) Besides, the payment of the debt and interest was the consideration given by the father for the purchase of his son's remainder in fee, a circumstance of itself probably sufficient to make the mortgage the personal debt of the purchaser, and, as such, primarily answerable out of his personal property.

That case was followed by a similar decision of Sir *W. Grant*, in the Earl of *Oxford* v. Lady *Rodney*.(*x*) There the late Earl, after subjecting his personal estate to his own debts, &c. and appointing his wife executrix and residuary legatee, devised all his real estates to his wife for life, remainder to trustees, to apply the rents and profits, after his wife's death, to pay his debts, then the mortgages upon his unsettled estates, and next the mortgages upon those in settlement. And "after payment of the mortgages in manner aforesaid,"

(*t*) 3 Ves. 128. 132.
(*u*) See Lord *Alvanley's* observations, 5 Ves. 539. and 2 Eden, 164.
(*x*) 14 Ves. 417. 424.

in trust for his heir at law. The testator purchased a leasehold house in *Harley-street* (then in mortgage,) which he specifically devised to his wife absolutely; and she, as executrix, exonerated the house from the mortgage out of the personal assets; which, it was contended was an improper application, and that the messuage was the primary fund for the payment; a proposition, the correctness of which depended upon the circumstances attending the sale and purchase of the premises. It appeared that the mortgagee was a party to the agreement of purchase, and to the conveyance to the testator. It also appeared, from the contents of the deed, that the testator agreed to purchase the lessees interest in the term, subject to the mortgage; and that the *mortgagee covenanted* with the testator to convey to him the legal estate in the term, on payment of principal and interest by instalments; and to do which the *testator covenanted with the mortgagee*, who agreed that he should enjoy the house until he failed in the performance of his covenant. Under these circumstances, Sir *W. Grant* was of opinion, that the testator had taken upon himself *personally* the mortgage debt, which rendered his personal assets primarily liable to the payment of it.

The reasons that influenced the Court's opinion, were similar to those upon which Lord *Alvanley* determined the preceding case of *Woods* v. *Huntingford*, and expressed by Sir *W. Grant* as follows: "Here is a direct *contract* with the *mortgagee*. As between the purchaser and vendor of the equity of redemption, I admit there is nothing but a purchase of a mere equity, subject to the mortgage: but here the contract is with two different persons having different interests in the estate; one an *equitable* interest, the equity of redemption; the other, the *legal* interest, the mortgage. The purchaser *contracts* with *both* at the same time, and both join in the conveyance to him. From the owner of the equity of redemption, he purchases his right to redeem; and having done that, immediately enters into another contract for the purchase of the other interest from the mortgagee; taking a covenant from the owner of the legal estate to take it from him upon payment of the mortgage money at particular periods, and in particular proportions; and there are covenants to pay that sum at those periods and in those proportions, and until default of payment in that mode for quiet enjoyment." His Honour distinguished the case from *Tweddell* v. *Tweddell*,(*y*) in the circumstance of the purchaser contracting with the mortgagees: and upon the whole, his opinion was such as before stated.

It would seem, however, that the purchaser contracting with the mortgagee is not indispensibly necessary to his assumption of the debt as his own, so far as relates to the equities between his real and personal representatives. That this is reasonable, appears from the consideration, that both real and personal estates are at the absolute disposal of the purchaser; and, since each class of representatives claim through him, both must necessarily succeed to his property according to the natures he has stamped upon them, and the liabilities attached to each by law in their administration as assets. If then, the transaction be between the purchaser and the vendor only, and it appear that the mortgage debt formed part of the considera-

(*y*) 2 Bro. C. C. 101. 152.

tion of purchase, the heir or devisee of the vendee will, as is presumed, have the same right to call for payment of the money out of the vendee's personal assets, as of the remainder of the price given for the estate, if due at his decease.

It was accordingly said, in *Cope* v. *Cope*,(*z*) that if *A.* mortgage his lands to *B.*, and afterwards sell it to *C.* for 1000*l.* *including the mortgage money*; the purchaser shall pay the mortgage, because *he has made it a debt in himself.*

And in *Billinghurst* v. *Walker*,(*a*) Lord *Thurlow* expressed himself in these words: "The mere purchase of an estate *subject* to charges, as an equity of redemption, does not make the personl estate of the purchaser liable to those demands; but if a charge be *part of the price*, then his personal estate is liable."

This doctrine does not rest merely on *dicta*, but it is established by a decision of Lord *Hardwicke*, and a judgment of the House of Lords.

In *Parsons* v. *Freeman*,(*b*) the case before Lord *Hardwicke*, *A.* purchased an estate for 90*l.*, which was in mortgage for 86*l.*; and he covenanted to pay that sum to the mortgagee, and 4*l.* to the vendor. Lord *Hardwicke*, after admitting the general rule before stated, thought, in this particular case, notwithstanding the *covenant* was with the *vendor only*, and the vendee's personal estate therefore not liable in that respect to the mortgagee, the *words* were sufficient to show an intention in the purchaser to make the mortgage his own personal debt.

The case finally determined in the House of Lords is the Earl of *Belvedere* v. *Rochfort*,(*c*) in which *Robert Rochfort* agreed to purchase of Mr. *Hughes* an estate for 900*l.*, then in mortgage for 450*l.* The purchase-deed stated that the debt and interest were to be paid by the purchaser *out of the consideration money* expressed in the instrument, upon which was endorsed a receipt acknowledging payment by the vendee in this manner: 450*l.* in money on the perfection of the deed; 450*l.* allowed on account of the mortgage. A decree was affirmed by the *Lords*, which declared that, under those circumstances, the purchaser had taken upon himself *personally* the mortgage debt, which ought therefore to be discharged out of his personal estate.

Hence it may be presumed, that where the purchaser includes the mortgage in the amount of the price to be given for the estate, and he covenants to discharge the mortgage, and to pay the difference to the vendor, the mortgage will be considered the personal debt of the vendee; and as such, his heir or devisee entitled to have the estate exonerated out of his personal assets. The case of *Tweddell* v. *Tweddell*, before referred to, has been considered of a contrary import; but the principle upon which Lord *Thurlow* professed to decide that case, *viz.* on the ground of the contract being one of indemnity against the mortgage, and nothing more, is correct and consistent with other authorities, and with his own subsequent declaration in *Billinghurst* v. *Walker*, provided the facts, to which he applied that principle, were sufficient to authorize the de-

(*z*) 2 Salk. 450. and see Ambl. 116. (*a*) 2 Bro. C. C. 608.
(*b*) 2 P. Will. 664 in a note by Mr. Cox. (*c*) 5 Bro. Parl. Ca. 299. 311. 8vo. ed.

cree, but which may be doubted; for it is difficult to conceive, when a person (as in that case) agrees to buy an estate in mortgage, for a sum of money, and he covenants with the vendor to pay to the mortgagee what is due to him, and the remainder to the owner of the estate, that the purchaser did not take the mortgage upon himself personally, as a *part of the price* to be given for the property.(*d*) .That such circumstances are sufficient evidence of the purchaser's intention to adopt the debt as his own, Lord *Hardwicke* determined in the before-stated case of *Parsons* v. *Freeman*; and although Lord *Alvanley*, in *Butler* v. *Butler*,(*e*) (a case in which the last was not cited,) thought himself bound by, and therefore reluctantly followed the authority of *Tweddell* v. *Tweddell*, yet, when a similar case shall occur, it may be presumed that the vendee will be considered, in conformity with Lord *Hardwicke's* decision, as having taken upon himself the mortgage debt, as part of the price to be paid for the purchase, which, will entitle his heir or devisee to have it discharged out of the personal estate.

In regard to the sufficiency of transactions by an *heir* at law, who succeeds to an estate in mortgage, to make that incumbrance his own personal debt, it was stated as a clear point by Lord *Northington* in *Donisthorpe* v. *Porter*,(*f*) "that, where an heir inherits a mortgaged estate, he makes the debt his own by covenant and bond, and a new equity of redemption; his personal estate (said his Lordship) is therefore liable to pay; he has by his own act willed it so."(*g*) .

After considering where the *general* personal estate is and is not exempted from the payment of all or particular debts and legacies, it will be proper in the next place to notice—

6. When *part* of the personal estate will be effectually appropriated for the discharge of legacies, in exoneration of what remains.

For the purpose of charging a part of the personal property with the payment of legacies in exemption of the residue, the testator's intention must be ascertained as in other cases, either by expressions, or a fair deduction from a rational construction of the whole of his will.

In *Bootle* v. *Blundell*,(*h*) before stated,(*i*) the Court declared, that the direction for paying the portions to the testator's daughters out of the money he might have at his death at *Ince*, or in the *Liverpool* bank, or due to him from that bank, and out of the rents and fines which should be owing to him at his decease, created a primary charge of those portions, upon these particular funds, in exoneration of the remaining personal property.

This subject being connected with the doctrine relating to legacies in their natures specific, though not regularly so, as being given with reference to a particular fund for their payment, the reader is referred to the third chapter of this Treatise(*k*) for additional authority.

(*d*) 14 Ves. 424. (*e*) 5 Ves. 534. (*f*) 2 Eden, 164.
(*g*) With respect to the exoneration of a wife's estate from incumbrances made upon it for her husband, see "Law of Husband and Wife," 1 vol. p. 140, *et. seq.*
(*h*) 1 Meriv. 193. 201. (*i*) *Ante*, p. 481.
(*k*) And particularly to the fifth section, from p. 166. to p. 171.

7 The exoneration of the personal estate is presumed to have been intended as a personal benefit for the individual legatee; and nothing is more clear than that where an exemption is created for the benefit of a particular person, and not in favour of the estate generally, if that person cannot take it, the benefit will never arise: hence it follows, that if the personal estate be exonerated from debts and legacies in favour of *A.*, and he die before the testator, by which event the disposition lapses; the *executors* or *next of kin* of the testator, who accidentally become entitled to the fund, will take it with its primary and natural obligation to discharge the debts and legacies. As an example of the principle of these remarks, the following case is adduced:

Mr. *Waring*, after bequeathing two annuities, and reciting his purchase of the manor of *Ince*, which he had mortgaged for the purchase money, devised his interest in the estate (subject to the annuities, and such other annuities, bequests, and directions, as by his will or by codicil he might give, expressly charging his *Ince* estate therewith) to his wife for life, remainder to such uses as she should appoint, but not to take effect until a mortgage affecting one of his estates should be discharged. The testator, after noticing that his wife had subjected her estate to raise 3000*l.* to pay 1850*l.* upon mortgage of his estate at *Oswestry*, the surplus of which sum he was to receive, directed his trustees to raise the 3000*l.* and discharge that mortgage, and pay the residue of the money to his wife, to whom he gave the *rest* of his personal property, in trust to discharge "all his debts, for which at his death he should *not* have given *real* securities," and all such bequests and annuities (not including those before mentioned) as he should therein or by codicil give, and with which he should not expressly charge his estate at *Ince*, and to keep the residue of the 3000*l.* and of all other his personal estate, to her own use: provided, that if she by other means paid the said mortgage and his debts, and the bequests and annuities (not including those before granted,) the 3000*l.* should not be raised. The testator's wife died before him; but he married again, and died without republishing his will. Under these circumstances, the question was between the testator's heir and second wife; the former insisting that the personal estate was applicable in exoneration of the real, to discharge the mortgage debt affecting the purchased estate. Lord *Alvanley*, after admitting that the first wife would have taken the personal fund exempt from debts, for which the testator had given real securities, determined that the exemption was personal to her, and consequently that the privilege determined with her life.(*l*)

8. We shall conclude this chapter in observing, that the real estate, when effectually charged with the payment of debts or legacies, will be liable to bear the burthen once only; so that creditors or legatees cannot resort to it again, if the persons entrusted with the power to raise and pay the money, raise, mis-apply, and waste it.

Accordingly, in a case, which was ultimately decided in the House of Lords, *Mich.* 1689, and reported in *Salkeld*,(*m*) a man limited an

(*l*) *Waring* v. *Ward*, 5 Ves. 670. and see *Hale* v. *Cox*, 3 Bro. C. C. 322, stated *ante*, p. 490 and *Noel* v. *Henley*, 7 Price, 241. 259. *S. P.*

(*m*) Anon. 1 Salk. 153. *et vide Carter* v. *Barnadiston*, 1 P. Will. 505. 518. *S. P.*

estate to trustees for payment of debts and legacies. The trustees raised all the money, and the *heir* prayed to have the land; which was opposed, on the ground of the trustees not having applied the money in conformity with the trust, but converted it to their own use, so that the debts and legacies remained unpaid. But it was resolved, that the heir should have the land discharged, and the legatees be left to their remedy against the trustees; upon the principle, that the estate was debtor for the debts and legacies only, and not for the misconduct of the trustees; whence it followed, that the estate continued liable *so long* as the debts and legacies *should* or *might* be paid, and *no longer;* and that when the land had *once* borne its burthen, and the money raised, it was discharged, and the trustees alone were liable.

CHAPTER XIII.

Of Legacies upon Condition

IN preceding parts of this work, certain species of conditional legacies have been noticed; which, from their importance, it was thought expedient to make the subjects of two distinct chapters.(*a*) In the present chapter it is proposed to treat of conditional bequests generally under the following heads:

SECT. I. Conditions precedent and subsequent.

1.—*When the conditions are* precedent, *and distinguished from* limitations.

2.—*When such conditions are* impossible.

3.—*When* illegal, *and of precedent conditions* in restraint of marriage.

4.—*Conditions* subsequent.

SECT. II. Performance of Conditions.

1.—*When the conditions are* precedent.

A. *Where the performance is not within the* time *mentioned in the condition.*

B. *From what period the* time for performance *is to be* computed.

C. *When the legatee has the* whole of life *to perform the condition.*

D. *Right of* executors *to perform the condition.*

E. *Where legacies are given to* executors *or* trustees.

2.—*When the conditions are* subsequent.

A. *Where they are* impossible.

B. *Where they are* repugnant *and* illegal.

C. *When they are* not to dispute *the* validity *of wills or bequests.*

(*a*) Chap. X. and XI.

D. *Where the* time of payment *of legacy, and the* condition *to* divest *it are* inconsistent.

3.—*When the conditions are* in restraint of marriage, *whether* precedent *or* subsequent.

A. *Where the conditions require* marriages with consent.

(A. 1.) *At* what time *consent ought to be obtained.*

(A. 2.) *And* from whom.

(A. 3.) *What will be* a sufficient consent.

First.—*Where the consent is* general, *i. e. to marry any person.*

Second.—*As to* retracting *consent.*

Third.—*Conditional assents.*

Fourth.—*Importance of legatee's supposition that there is no consent, when it is judicially considered as given.*

Fifth.—*Of implied consents.*

Sixth.—*Effect of consents* by testators *themselves to marriages, required by their wills to be had with consent* after their deaths.

(A. 4.) *Whether conditions requiring consent are fully performed by* first *marriages with consent.*

(A. 5.) *Whether such conditions will be* confined *to the* periods *appointed for* payment *of the legacies.*

[a.] *And the effect of marriages* without consent *when the legatee afterwards* survives the time when the legacy is payable.

(A. 6.) *As to conditions requiring marriages with consent being considered* in terrorem.

B. *Conditions requiring marriages with persons bearing the* surnames *of* testators.

Sect. III. Respecting forfeiture generally, by non-compliance with testamentary conditions.

Sect. IV. Necessity of giving notice of conditions.

1.—*In regard to personal bequests.*

2.—*When the devise is of real estate.*

A Legacy upon condition may be defined, "a bequest, whose existence depends upon the happening, or not happening, of some uncertain event, by which it is either to take place, or be defeated." In deeds, &c. which are presumed to be made with great care, the

law has ordained certain appropriate words to create conditions; but in wills, other words are sufficient for the purpose, by reason of the indulgence the same law allows to that imbecility of body and mind, under which it considers testators to labour, at the period of making those instruments. In all cases, therefore, where the intention can be collected, that the bequest should be conditional, and the terms are so definite as to admit of execution, that intent, if legal, will be effectuated by whatever words expressed.(*a*) This was exemplified in the following instance:

The testatrix, by a codicil, bequeathed to her son (the plaintiff) as follows: "Provided my son changes the course of life he has too long followed, and will give up all his low company, and frequenting public houses entirely, I then leave him, but not otherwise, the interest of 5500*l.* for life," &c. And if he should not do so, she gave him only 50*l.* a year for the same period. The evidence of the son having complied with the condition was not satisfactory; and it was contended on his behalf, that the condition was *so vague*, as to be incapable of enforcement in a court of justice. But Sir *W. Grant* was of a contrary opinion, and directed the Master to inquire, whether the plaintiff had discontinued, and how long, to frequent public houses, drinking to excess, and keeping low company, according to the codicil.(*b*)

Conditions admit of a two-fold division, *viz.* into conditions *precedent*, and conditions *subsequent*. The former are such as must generally happen or be performed before the legacy can vest. The latter are such as by non-performance or breach of them will, in most instances, defeat the legacy already vested. So that if a bequest were made to *A. upon* his marriage with *B.*, or if, or provided, or in case, he married *C.* or into the family of *C.*;(*c*) or at, or when, or if, or provided, or in case, he attained twenty-one;(*d*) the bequest would be made upon a condition *precedent* to the vesting of the legacy. The condition would be alike precedent, and require completion, if the bequest were made to *A.* being abroad, "in case he should ever return to *England*";(*e*) or if a legacy were given to the testator's widow payable in six months after his death, *provided* she released her right to dower or all demands upon the testator,(*f*) or paid to *C.* 20*l.*(*g*). But if a term of years were devised to *D.*, upon condition that he paid to *C.* 1000*l.* at *Michalemas* next after the testator's death, it would be a subsequent condition, which would devest and defeat the bequest, if omitted to be performed.

SECT. I. Of conditions precedent.

1. Distinction between condition and limitation, and the consequences.

Whenever it appears that the happening of an event, or the performance of an act, was intended to operate as a condition to precede

(*a*) Swinb. pt. 4. sect. 5. Co. Litt. 204. a. Touchst. 451. Fulbeck's Paral. 62.
(*b*) *Tattersall* v. *Howell*, 2 Meriv. 26. and see *Neal* v. *Hanbury*, Pre. Ch. 173. stated *ante*, p. 426.
(*c*) 1 Bro. C. C. 55. T. Raym. 80. Show. Parl. Ca. 84. Co. Litt. 206. 14 Ves. 392.
(*d*) *Ante*, p. 383. 2 Vern. 333. 2 Atk. 41. (*e*) *Sprigg* v. *Sprigg*, 2 Vern. 394.
(*f*) *Weldon* v. *Oxendon*, cited Forrest, 273. *Taylor* v. *Popham*, 1 Bro. C. C. 168.
(*g*) Swinb. pt. 4. sect. 7.

the vesting of a legacy or devise, it is essential that the event happens, or the act is done, since no interest will previously vest in the legatee or devisee,(*h*) as has been shown in the tenth chapter of this Treatise. In addition to the authorities there produced are the following:

In *Doe* v. *Shipphard*,(*i*) land in *Essex* and *Lancaster* were devised to trustees, to pay out of the rents to the testator's married daughter, 20*l.* annually, for her separate use for life, and the remainder during her life, and the whole of them after her death to her husband for life. "And *in case* his daughter survived her husband," the testator limited the estate to the use of his daughter for life, remainder to his grand-son and heir in tail, with remainders over. The testator then devised to the same trustees, other lands to the use of his daughter and her husband, and the survivor of them, until his grand-son attained the age of twenty-five; at which period, or at the death of the survivor of the daughter and her hnsband, these lands were to be to the use of the grand-son in tail, with remainders over. The daughter died before her husband, and the question was, whether her surviving him was not a condition precedent to the several limitations over of the *Essex* and *Lancaster* estates, which not having happened, those estates devolved upon the testator's heir? And the Court of *King's Bench* decided, that the contingency of the daughter surviving her husband was a condition precedent to the vesting of the limitations, which not having happened, the heir was entitled.

In consistency with the last determination, the same Court, decided the case of *Doo* v. *Brabant*, stated in a preceding page.(*j*)

But whether a contingency, apparently denoting a condition precedent to the devise or bequest, be or be not a condition, must be determined upon a fair collection of the testator's intention from the whole of his will. Hence, although the expression used by him may appear to denote its dependance upon a contingency, which may not happen, still, if the context of the will clearly show his intention, that the event described was not to precede the vesting of the legacy, but the legatee should have it at a particular time, whether the contingency happened or not, the form, in which the bequest is made, will not be permitted to create a precedent condition;(*k*) for in these and similar cases, courts of justice, in favour of the intention, consider the executory devises as *limitations*, and not *conditions*, which are required to be literally performed, previous to the vesting of any interest, as we have seen; whereas limitations being construed according to the sense and intention of testators, it is not necessary that every particular circumstance should take place. Hence have arisen those cases, where a testator devised to the child with which his wife was *enceinte*, and if it died before twenty-one, then over; the limitation over was held good, although the wife proved not to have been *enceinte*, and there was no express devise upon that event. The principle is obvious. The intention was clear that the limitation over should take place, if, in any event, the preceding was disappointed. The circumstance, therefore, of there

(*h*) *Sprigg* v. *Sprigg*, 2 Vern. 394. (*i*) Dougl. 75.
(*j*) *Ante*, p. 329. and see *Davis* v. *Norton*, 2 P. Will. 390. (*k*) *Ante*, p. 387.

happening to be no child *en ventre sa mere*, was not allowed to prevent the alternative bequest, which would have been the necessary consequence, if the existence of the child *en ventre sa mere*, when the will was made, had been adjudged an essential preliminary to the vesting of the limitation over; *i. e.* if it had been considered a condition precedent. The following is a principal authority upon this subject:

In *Jones* v. *Westcomb*,(*l*) the testator bequeathed a term of years to his wife for life, remainder to the child she was *then enceinte* with; and, if it died under twenty-one, a third part of the term was to belong to his wife, and the remaining two-thirds to other persons. Although the wife was not *enceinte* when the will was made, Lord *Harcourt*, determined that the devise to her was good.

It is observable in the last case, that the devise to the infant being ineffectual, was considered as if it had never been made. According to the declaration of *Lee*, C. J., (*m*) the law is the same, whether the preceding devise be originally void or become so by non-existence or non-entity of the person. And it is to be remarked, that there is no distinction in those respects, whether the subject of disposition be real or personal estate; and that the the principle of the last class of authorities has been applied to other cases both at law and in equity.

Thus in *Holcroft's* case(*n*) the devise was to the use of the first son of Sir *John Holcroft* in tail, and so to the second, third, and fourth sons in succession. And if the *fourth* son died without issue, remainder to *Hamlet Holcroft* with remainders over. Sir *John* had only *one* son; upon which the question was, whether the subsequent uses could arise, and it was determined in the affirmative, since the words amounted to no more than a *limitation* of the estate, and were *not* a condition precedent to the estate of *Hamlet*.

So in *Bradford* v. *Foley*,(*o*) the testator devised his real estate to his son, *Thomas Hey*, for life, remainder to his first and other sons by any *future* wife in tail male, &c.; but if *Thomas* married a relation of his then wife, the estate was to be to the use of the children of *John Hey* as tenants in common. *Thomas* did not marry again, and yet the Court of *King's Bench* decided, that the children of *John* living at the testator's death were entitled, which could not be, if the second marriage of *Thomas* had been considered a condition precedent to the limitation over to those children.

In the next cases courts of equity followed the rule of law.

Accordingly, in *Avelyn* v. *Ward*,(*p*) the testator devised his real estate to his brother and heir, *Goddard Urling*, in fee, upon condition that he gave to the trustees a general release within three months after his (the testator's) death. But if *Goddard* neglected to do so, the testator gave his real estate to *Richard Ward* and his heirs. *Goddard* died before the testator, and Lord *Hardwicke* determined that the devise over took effect, since the contingency,

(*l*) Pre. Ch. 316. 1 Eq. Ca. Abr. 245. *S. C.* and see *Gulliver* v. *Wickett*, 1 Wils. C. P. 105. *Statham* v. *Bell*, Cowp. 41. and *Scatterwood* v. *Edge*, 1 Salk. 229. and 3 Ves. 320. The case of *Grascot* v. *Warren*, 12 Mod. 128. *contra*, was decided without argument, and may be considered of no authority.

(*m*) In *Andrews* v. *Fulham*, 1 Ves. sen. 421. (*n*) Moor, 486. Cited Cowp. 42.

(*o*) Dougl. 63. (*p*) 1 Ves. sen. 420.

according to the intention, was not a condition precedent to such devise, but that the contingency and devise over operated as a *conditional limitation*, which enabled the Court to decide agreeably to the *intent* of the testator; which was, that, if no release was executed, the estate should go over.

The following are instances in which courts of equity adopted the like construction in testamentary dispositions of personal property:

In *Parry* v. *Boodle*(*q*) the testator gave to *Charles Douglas* a a bond debt of 2000*l.*; but if *Charles* should not be in life, the money was to be divided between the plaintiffs. *Charles*, unknown to the testator, was living at the date of the will, but died before him; and Lord *Kenyon*, M. R. determined, that the plaintiffs and not the residuary legatee, were entitled to the bond-debt.

It is observable in the last case, that the testator intended the legacy for the plaintiffs if *Charles* were not in a condition to take it. So that, although the event upon which the limitation over was expressed, did not literally occur, still, as it happened in effect, the Court, upon authority of the testator's intention, was of opinion, that the death of *Charles* when the will was made was not a condition precedent to the bequest to the plaintiffs; but it construed the words "if *Charles* should not be in life," in the sense of his not being alive at the death of the testator, the period when the bequest to him was to take place.

Also in *Pearsall* v. *Simpson*,(*r*) the testatrix vested personal estate in trustees, to pay the interest to *A.* and *B.* for life, in succession; and, after the survivor's death, to divide the capital among their children then living; but if neither of them left children who should attain the age of twenty-one, to pay the interest to *C.* for life; "and after *C.*'s death *in case* he should become entitled to such interest," to divide the principal between *D.* and *E.* *C.* died before *B.* and neither *A.* nor *B.* left children at their decease. It was nevertheless determined by Sir *W. Grant*, M. R. that the limitation over to *D.* and *E.* took effect.

His reasons seem to have been these: it would be absurd to impute an intention to the testatrix to make the bequest to *D.* and *E.* depend upon *C.*'s living to receive the interest, (an event unconnected with any intention in regard to them,) when the will afforded a more rational indication of her meaning, which appeared to be, that the limitation over to *D.* and *E.* should take effect upon the death of *C.* whenever that event happened. The rest of her expressions, in relation to that circumstance, being merely introduced in consequence of recollecting the uncertainty, whether *C.* would live to enjoy the interest, and not with an intent to make that event a condition precedent to the vesting of the executory limitation.

Again in *Meadows* v. *Parry*,(*s*) the testator gave his residuary estate to trustees for the benefit of such children as he should leave at his death; but if all of them died under twenty-one, the residue was to go to his wife. The testator never had a child, and

(*q*) 1 Cox, 183. (*r*) 15 Ves. 29. 33.
(*s*) 1 Ves & Bea. 124. and see *Fonnereau* v. *Fonnereau*, 3 Atk. 315. *S. P.*

Sir *W. Grant*, M. R. determined, upon the authority of the preceding cases, that the bequest to the wife took place.

2. But, when there is no doubt of the bequest being made upon a preceding condition, it may happen that the terms of it are *impossible;* an impossibility which may be commensurate with the creation of it, or be subsequently rendered so by the act of God or of man. Or the terms or event upon which a legacy is given may be *illegal.* In these cases it may be asked, can the legatees claim their legacies, although the terms upon which they are given, or the events upon which they are to vest, cannot be performed or happen? To answer these inquiries, it is necessary to take a short view of the principles of the common and civil laws upon these subjects.

It is a general rule of the common law, applicable to *real* estates, that where an interest is so devised as only to arise upon a preceding condition, it cannot vest until that condition be performed, or the event happen, upon which it is given.(*t*) This rule has been acknowledged and acted upon ever since the time of Lord *Coke.*(*u*) The principle is, that there is no devise until the happening of the event, or performance of the terms upon which the disposition is made; a principle which applies to every case, so that although the condition require the performance of an *impossible* act, as for the devisee to go to Paris in half an hour, or it require the devisee to do an *illegal* act, as to kill *B.* or to burn his house, (conditions *mala in se;*) or whether it require a woman to separate from her husband, (a condition against the policy of law;) or whether the devise be made on condition that the legatee have criminal connexion with a particular person (a condition *contra bonos mores;*) the before stated principle authorizes the conclusion, that, as all such conditions are void, the dispositions to arise only upon their performance are also void. But the rule of the Civil law is different, so far as it has been received; and by that law bequests of personal property are determined both in the Ecclesiastical courts and in courts of Equity.(*x*) Consequently, the Common law is partially superseded in the construction of personal bequests, and the Civil law is referred to upon those occasions. It seems, therefore, that what is a good or void condition by the Civil law (attending to the qualification before mentioned,) is the same in Equity upon the subject of legacies; and since that law made no distinction between the circumstance, whether the condition were precedent or subsequent, but in either case rejected the impossible or illegal part of it, and, on performance of the remainder, gave the legacy to the legatee; so it seems a court of Equity would do under similar circumstances. We shall begin with considering bequests made upon impossible conditions which are precedent.

FIRST, Bequests made upon *impossible* conditions which are precedent.

It is the general rule of the Civil law, that, when the condition, upon which a legacy is given, is impossible, the bequest is single, *i. e.* discharged from the condition: so that, if a legacy were given to

(*t*) Co. Litt. 206. *Ughtred's* case, 7 Rep. 10. a. Touchst. 132. 451. 2 Black. Com. 156. (*u*) 6 Term. Rep. 719. (*x*) 2 Dick. 720.

B., if he drank up all the water in the sea, he would be entitled to the legacy, as if the disposition had been simple or without any condition.(*y*)

But that rule was not without its exceptions; for, although the condition happened to be impossible at the time of the gift, yet if that fact were unknown to the testator, and from the nature of the requisition it appeared to be the sole motive of the bequest, the impossibility of the condition would preclude the legatee of his legacy.

Suppose then a bequest to *B.* if he married the testator's daughter, who happened to be then dead; as *non constat* the legacy would have been given, if the testator had been apprised of his daughter's death, the impossibility of the condition would not be allowed to operate to the advantage of the legatee.(*z*)

Upon the same reasoning, if the testator's daughter had been living at the date of the will, but died before her marriage with *B.* could be solemnized, by which accident the condition, which was possible in its creation, became impossible by an unavoidable subsequent event, the act of God; still the condition was effectual, and impracticability of its performance would prevent the title of *B.* to the legacy.(*a*)

It is presumed that the decisions of Courts of Equity, in such cases as the above, would accord with the Civil code; for those rules and exceptions are established on great authority, and are founded upon good sense.(*b*)

Under the head of impossible conditions, those may be classed, where testators, through ignorance, have required acts to be done, that have been performed, or events to happen, which have taken place. In those instances, as the conditions are impossible, the legatees take their legacies pure and unqualified. The following are examples of this proposition:

Suppose a legacy to be given to *B.* "if he remit a debt due to him from *C.*:" a demand, which happened to be remitted prior to the date of the will; the bequest will be single and absolute in *B.*

So also if a legacy were given to *C.* upon the contingency of a particular ship of the testator returning from a voyage, in the prosecution of which she is then supposed to be, when in fact the vessel had arrived; *C.* would be entitled to the legacy.(*c*)

In like manner, if the impossibility of the condition arise from the subsequent act of the testator, the legacy will be single and absolute. An example of which is afforded in the following case.

Mr. *Darley* being seised of an estate called *Battens*, and entitled to an adjoining house called *Bond's Walls* for an unexpired term of years, devised the latter upon the same trusts as he had declared of the former, so far as the law would permit; and he bequeathed to his wife the rents of all his chattel estates for life, "*if* she chose to reside at *Battens*:" and declared that she should enjoy for the same period, the use of all his household goods, plate, and furniture at *Battens*, and the live and dead stock upon the premises. The testator afterwards suffered a recovery of *Battens*, by which the dispositions of it by his will were revoked, and it devolved upon his heir

(*y*) Swinb. pt. 4. sect. 6. art. 2. (*z*) Ibid. art. 8. (*a*) Ibid. art. 14.
(*b*) *Per* Lord *Northington*, 1 Eden, 117. (*c*) Swinb. pt. 4. sect. 14.

at law. Hence the widow was prevented residing at *Battens*, the condition upon which the benefits were given to her by the will: nevertheless the House of *Lords*, in reversal of a decree by Lord *Camden*, declared in favour of the widow, upon the principle, that the bequests to her were discharged from the condition, as the recovery suffered of *Battens* by the testator, had disabled her to perform it.(*d*)

SECOND. Precedent conditions which are *illegal*.

It is a rule of the Civil law, that, if a precedent condition require the performance of an act *malum in se*, as to kill *B.*, burn his house, &c.; not only the condition, but the disposition itself is void;(*e*) a rule, which being in unison with the Common law(*f*) in devises of real estate, it is presumed that similar dispositions of personal property will receive the like construction in courts of Equity.

When, however, the illegality of the condition does not concern any thing *malum in se*, but is merely against a rule or the policy of law, the condition only is void, and the bequest single and good; for the condition not being lawful, it is held in the phrase of the Civil law *pro non adjectâ*.

That this is so in Equity appears from the following case:

In *Brown* v. *Peck*,(*g*) Mr. *Sparks* bequeathed to his niece *Rebecca* 15*l.* for mourning; and if she lived with her husband, 2*l.* a month, and no more; *but if she lived from him*, and with her mother, then she was to receive 5*l.* a month. Lord *Northington* was of opinion, that *Rebecca* was entitled to the monthly payment of 5*l.* observing, that the condition being both impossible at the time of its imposition, and *contra bonos mores*, the bequest was simple and pure. See also *Poor* v. *Mial*, 6 Madd. 32.

With respect to the legality of conditions in testaments requiring the marriage of legatees under particular limitations or qualifications, courts of Equity have been not a little embarrassed, since the Civil law, in framing its original rule upon this subject, showed great jealousy of all conditions which imposed the *least* restraint upon entering into that engagement; establishing the legacies and avoiding the conditions, without distinction as to their being precedent or subsequent. The Ecclesiastical courts having blindly adopted that rule, and courts of Equity entertaining a concurrent jurisdiction with them on the present subject, the latter tribunals, with a view to uniformity of decision, have been more or less biassed at different periods by the Civil law. That a restraint upon marriage may be judicious and proper, admits of no doubt, and its total rejection by that law, as at first established, appears to have been founded on no general principle; but upon the particular circumstances of the *Roman* empire at the time. After the civil war, the depopulation occasioned by it led to habits of celibacy. In the reign of *Augustus* the *Julian* law, which *went too far*, and *was corrected* by the *Lex Papia Poppæa*, not only offered encouragement to marriage, but laid heavy impositions upon celibacy. The rule being thus established for the encouragement of marriage, it followed, that no person could impose restraints directly contrary to the law. Hence, under this local and political regulation, it became a rule of con-

(*d*) *Darley* v. *Langworthy*, 3 Bro. Parl. Ca. 359 8vo. ed.
(*e*) Swinb. pt. 4. sect. 5. art. 9. & 16. (*f*) Co. Lit. 206. (*g*) 1 Eden, 140.

struction that these restrictive conditions were void: a rule, certainly inapplicable to a country, where there is no law to restrain individuals, from exercising their own discretion as to the time and circumstances of the marriages, which their children or the objects of their bounty may contract. How such a rule so established ever came to be adopted in the Ecclesiastical courts of this kingdom, is only to be accounted for from the circumstance, that, in the dark ages, soon after the revival of letters, there was a blind superstitious adherence to the text of the Civil law. Judges never reasoned, but only looked into books, and transferred the rules there found into their courts, as *positive* rules to direct them, without considering the circumstances.(*h*) Such probably was the manner, in which the Ecclesiastical courts obtained and adopted the rule of the Civil or Canon law as first established upon the present subject, without attending to its subsequent modifications; and it seems to have insinuated itself into courts of Equity in a similar manner. The early cases refer in general to the Canon law, as the standard by which all legacies are to be governed; towards the latter end of the last, and the beginning of the present, century, the matter is more loosely handled: The Canon law is not referred to as affording a too *positive* rule; but conditions of this description are treated as partaking of the force allowed them by the law of *England*, though, at the same time, as unfavourable to the good order of society; and at length it became a common practice to hold such conditions only *in terrorem*.(*i*) The unreasonableness of the supposition, that a testator did not mean what he expressed, combined with the consideration, that the law of this country did not in policy restrain the impositions of judicious restraints upon marrige, has at last, amid conflicting opinions, fixed the law upon this subject, agreeable to the corrected rule of the Civil law; and it is now settled, that conditions, imposing particular restraints upon marriage, in testamentary dispositions of personal property, are legal and binding.

If then a bequest be made to *A.* upon his marriage under twenty-one, or other reasonable period, with consent of parents, trustees, executors, or guardians, it will not vest in him until he comply with that requisite; for the condition is precedent and legal, notwithstanding the contrary decision of Lord *Hardwicke* in *Reynish* v. *Martin*,(*k*) and the preceding determination by Justice *Parker* in *Underwood* v. *Morris*.(*l*)

Accordingly, in *Hemmings* v. *Munckley*,(*m*) Mr. *Clutsam* bequeathed five-sixteenths of his residuary personal estate to trustees, to invest and pay the interest to his daughter *Rachael, upon* her attaining the age of twenty-eight, or day of marriage, which should first happen, *provided* she married with the approbation of his executors or those then living. The remaining eleven-sixteenths the testator gave among his other four children, and declared, that if either of his sons or daughters died before their shares became payable, their parts should belong to his children *then* living, and the issue of any who might be dead at that period, *per stirpes*, at the same times as their original shares would become due. *Rachael*

(*h*) 3 Ves. 96. (*i*) 2 Bro. C. C. 487. (*k*) 3 Atk. 330.
(*l*) 2 Atk. 184. (*m*) 1 Bro. C. C. 303. ed. by Belt.

married Mr. *Curley without the consent* of the executors, and had a child (to whom *Curley* was administrator), and died under the age of twenty-eight. The surviving children of the testator insisted, that *Rachael's* portion never vested, since she married without consent, and did not attain the age of twenty-eight. On the contrary, it was urged for Mr. *Curley*, the administrator of his wife and child, that the legacy vested in *Rachael* upon her marriage, notwithstanding the condition which was to be considered *in terrorem* only, and the case of *Underwood* v. *Morris* (last referred to) was cited. But Lord *Rosslyn* said, he doubted the authority of that case, and determined that the legacy did not vest. There having been five children of the testator, his Lordship held, that the infant child of *Rachael* was entitled to one-fifth of her mother's share under the limitation over, as it answered the description of "issue of a deceased child;" which fifth part he directed to be paid to her father as her administrator.

The last case was followed by a similar decision of Lord *Thurlow* in *Scott* v. *Tyler*;(*n*) where, although there was a limitation over of the legacy, it was not dependant upon a marriage without consent, but upon a dying under a particular period, without marriage *ever* having taken place; a limitation which was disappointed by the marriage of the legatee, though without consent.

There Mr. *Kee* bequeathed 10,000*l*. *South Sea* annuities to his executors, in trust to pay part of the dividends for the support and education of his god-daughter Miss *Tyler* during her minority, directing that a moiety of the capital, with the savings, should be transferred to her *at* twenty-one, in case she were then unmarried, and the remaining moiety at the age of twenty-five, if she should be then single. "But in case she married before twenty-one with the consent of her mother," one half of the 10,000*l*. and savings was to be settled upon her and her issue, at the discretion of the mother, and the remainder of the annuities was to be at her own disposal; but if she died under twenty-five unmarried, the testator gave the 10,000*l*. to her mother, who was appointed residuary legatee. Miss *Tyler*, while an infant, married the plaintiff *Scott*, against the consent of her mother, upon which they claimed the 10,000*l*. as an absolute legacy, insisting that the condition, requiring the consent of the mother to the marriage, was void as against policy, and by the Civil law which was the rule followed by the Courts in this kingdom. But Lord *Thurlow*, after taking a review of that law, and the extent of its adoption into the Courts of this country, determined the condition to be obligatory. Whence it followed, that as the legatee married under twenty-one without her mother's consent, she never came under the *description* to which the gift of the 10,000*l*. attached, consequently the fund being undisposed of, formed part of the residue which was given to the mother.

Lord *Rosslyn* was called upon to consider his opinion in *Hemmings* v. *Munckley*, in the following case; and his Lordship adhered to that opinion.

In *Stackpole* v. *Beaumont*,(*o*) Sir *Thomas Blacket* devised his

(*n*) 2 Bro. C. C. 431. 489. His Lordship's judgment is more fully reported in 2 Dick. 712.

(*o*) 3 Ves. 89. and see *Knight* v. *Cameron*, 14 Ves. 389.

real estates in remainder to the use of his third natural daughter *Louisa Wentworth*, or such person, if any, with whom she should first intermarry, "if before twenty-one, then with the consent of his trustees or the survivor of them," for their joint lives and the life of the survivor, &c. Towards the conclusion of the will, the testator gave to *Louisa* 10,000*l.* "payable and to be paid to her as follows; 5000*l.* *upon* her marriage *with such consent as aforesaid*, and 5000*l.* within two years next afterwards." *Louisa* while an infant and a ward of the Court of Chancery, eloped and was married in *Scotland* without the consent of the trustees. And it was one of the questions, whether, under those circumstances, *Louisa* and her husband were entitled to the legacy of 10,000*l.* and to have a moiety of it paid immediately. Lord *Rosslyn* determined in the negative, declaring that the condition was perfectly legal, and that *Louisa*, in not marrying with consent, never placed herself in a situation to answer the *description* of the bequest.

It is observable in the last case, that there was no limitation over of the legacy in the event of the legatee marrying without consent, and yet the restrictive condition was held legal and binding, which when once established, necessarily precluded the legatee marrying without consent, from taking any interest in the bequest, as not answering the description in the will.(*p*) The two last cases appear to have decided thus far, that when the condition requiring consent to the legatee's marriage if it take place under twenty-one, &c. is *precedent*, it is immaterial whether there be or be not a limitation over of the legacy upon the marriage without consent; as in either case the condition is good and conclusive upon the legatee.

It appears from the case of *Hemmings* v. *Munckley* before stated, (*q*) that where there is such an executory bequest over, the condition is valid.

But there does not seem to be any direct authority which establishes that a mere simple condition, requiring the marriage of the legatee *precedent* to the bequest, is valid. There is however a *dictum* of Sir *Thomas Plumer*, V. C. in *Malcolm* v. *O'Callaghan*,(*r*) that in such an instance, if there was no bequest over, the restriction would be void. That was the case of a legacy made payable upon marriage with the consent and approbation of executors, with a limitation over upon a marriage without such consent. His Honour determined upon the effect of the bequest over, that the condition was obligatory, which having been broken, the limitation over took place.

The *dictum* of Sir *Thomas Plumer*, in the last case, seems exposed to this objection, that the *ancient* rule of the civil law afterwards became greatly restricted, and it was finally settled, that conditions which did not directly or indirectly import an *absolute* injunction to celibacy were good.(*s*) Hence the preliminary requisite of marriage with consent at any time, being neither a general nor a fraudulent restraint upon marriage, as such conditions are not void by the Civil law, there appears to be no reason why they should be so by our own.(*t*)

(*p*) *Ante*, p. 505. (*q*) *Ante*, p. 508. (*r*) 2 Mad. 349. 353.
(*s*) Swinb. pt. 4. sect.. 12. 2 Dick. 721.
(*t*) See Lord *Eldon's* declaration in *Clarke* v. *Parker*, 19 Ves. 15. *D'Aguilar* v. *Drinkwater*, 2 Ves. & Bea. 226. and Sir *W. Grant's* observations in *Lloyd* v. *Branton*, 3 Meriv. 116.

In this view of the law upon the present subject, it follows, that, if there be two provisions for the legatee in the same will, but one of them is made to arise upon marriage generally with consent as a *precedent* condition, the condition is valid and must be performed, whether there be a limitation over of the legacy, or not.

This was so determined by the Lord *Keeper* in *Creagh* v. *Wilson*,(*u*) a case in which Mr. *Wilson* bequeathed to his grand-daughter *Elizabeth* 200*l.* provided she continued with his executors till twenty-one; but if she were taken from them by her father (a *Roman Catholic*) before she attained that age, or "in case she married against the consent of his executors, he gave her only 10*l.*" *Elizabeth* paid her father a visit with the assent of one of the executors, during her minority, who took that opportunity of marrying her to a papist without the executor's consent. She and her husband obtained a decree at the *Rolls* for the legacy of 200*l.* which was reversed by the Lord *Keeper*, upon the principle, that the condition requiring consent being *precedent*, *Elizabeth* did not answer the description of the bequest.

So in *Gillet* v. *Wray*,(*x*) the testator gave his grand-daughter an annuity of 10*l.* for life; and by a codicil declared, that "if she married with the good liking of his trustees, then she should have 150*l.* in lieu of the annuity, which was to cease." The grand-daughter married without the required consent, and Lord *Cowper* determined that she was not entitled to the 150*l.*

The cases upon these conditions cannot be expected to agree since they were adjudged at periods when the Courts paid more or less attention to the Civil code. We consequently find an old case of *Hicks* v. *Pendarvis*;(*y*) on alternative bequests, in which *Hale*, C. J. decided, that the *preceding* condition requiring marriage with consent was *in terrorem*, and decreed the larger legacy to the legatee, although she married without consent: a determination overruled by the two more recent cases last stated.(*z*)

Since the rigour of the ancient rule of the Civil law was corrected and moderated as before stated,(*a*) and conditions not absolutely prohibiting marriage were allowed to be good,(*b*) it is a consequence that conditions which require or prohibit marriages with particular persons,(*c*) or limit marriages to particular families,(*d*) or which prescribe the due ceremonies and the place of marriage, (as if the bequest were made to depend upon the legatee marrying in the city of *York*,)(*e*) are valid, and must be complied with.

If such be now the settled validity of precedent conditions in restraint of marriage, when the subject is *personal* legacy, *a fortiori*, the rule is the same when real estate is devised upon the like conditions, or the legacy must be paid out of it. For at all times these conditions were binding by the Common law; and as the Ecclesiastical courts had no jurisdiction over that species of property, the temporal courts were not fettered by the adjudications of the former tribunals according to the ancient rule of the Civil code.(*f*)

(*u*) 2 Vern. 572. (*x*) 1 P. Will. 284. (*y*) 2 Eq. Ca. Abr. 212. (D.) pl. 1.
(*z*) And see 2 Dick. 722. (*a*) *Ante*, p. 508.
(*b*) See Swinb. pt. 4. sect. 12. *passim*. (*c*) 2 Dick. 721, *Perrin* v. *Lyon*, 9 East. 170.
(*d*) 1 Bro. C. C. 55. (*e*) Swinb. pt. 4. sect. 12. art. 12. 2 Bro. C. C. 488.
(*f*) See *Reynish* v. *Martin*, 3 Atk. 330. *Reeves* v. *Herne*, 5 Vin. Abr. 343. pl. 41. and *Harvey* v. *Aston*, 1 Atk. 361.

Not only conditions, which interfered with the liberty of marriage, were held to be illegal and void by the Civil law, as we have seen, but also conditions which had a tendency to infringe upon the liberty of another person's testamentary disposition. The latter conditions had the epithet of *captious* given to them.

Accordingly, if a legacy were given by *A.* to *B.*, upon condition that *B.* should leave *A.* the like legacy by his testament, such condition would be void by the Civil law, first, because it is considered as inconsistent with that freedom of will which *B.* ought to possess at the time of making his testament; and secondly, because such condition is presumed to be clothed with artifice, and inserted by *A.* with a view of obtaining undue advantage over *B.* So odious are these conditions to the Civil law, that they are declared void, although inserted in testaments purely military, or in the testaments of fathers providing for their children, or in testaments *ad pias causas*, and the like. If however the condition had no reference to the *future* act of the legatee, but the terms of the bequest were in substance as follow; viz. "I bequeath to *A.* 100*l.* if he *has* bequeathed to me a like sum by his will," the condition would be supported, as it was apparent that the condition did not in the least interfere with *A.'s* liberty of disposition, and therefore the case did not fall within the law of captious bequests.(*g*)

A second class of captious bequests depending upon similar reasoning is, when a testament is said to depend upon the will or appointment of another person. Suppose, then, *C.* to bequeath a legacy of 50*l.* to *A.* if *B.* will, or to such person as *A.* shall appoint, the legacies would be void by the Civil law.(*h*) The first case would be so adjudged for this reason, viz. that ancient legislators considered, if testators were permitted to refer their testaments to the wills of other persons for effect, it would open a spring for fraud, by putting it in the power of the person depended upon, to disappoint the person intended to be benefitted by the testator. The second case would be adjudged void, because, by the Civil law, testators are not invested with the power to refer the substance of their wills, to the *arbitrium* of other persons, the power of disposition being considered as annexed to the person of the testator, and incapable of delegation, except in the particular cases mentioned in *Swinburne*.

Such being the rule of the Civil law concerning bequests, which it terms captious, it may be asked, whether courts of Equity have adopted its reasoning in similar instances? With regard to the first class of these bequests, there does not appear to be any case in which those courts have been called upon to decide the precise question. The reasons given by the Civil law for rejecting them are not destitute of policy and wisdom, and therefore entitled to respect. The reason, says *Swinburne*, referring to authorities, why these bequests are called *captious*, is, "because the testator, imposing the condition, endeavours to catch or entrap the legatee, by inducing him to give such testator a legacy in case the legatee dies first, by which means also the liberty of bequeathing, which the legatee ought to enjoy, is destroyed; and, as in marriages, the same ought to be *free*, not only from the fear of incurring loss, but also from the apprehen-

(*g*) Swinb. pt. 4. sect. 11. *passim*. (*h*) Swinb. pt. 4. sect. 11. art. 7.

sion of not obtaining gain, so in testaments the same ought to be made with all freedom, not only divested from the fear of incurring loss, but also without any prospect of gain or reward." With due deference to those reasons, it seems that the law of *England* allows every person to dispose of his property as he chooses, provided his will be not contrary to legal policy; and fraud is never presumed without proof. No solid objection, therefore, arises to qualify this liberty, in instances where two persons are desirous to create by their testaments a contingent benefit, in favour of the one, who may happen to survive the other, where no deceit has been practised by either party. It seems, however, settled, that if two persons enter into a fair and definite agreement to leave each other a sum of money, or to settle by their wills the property of each for the benefit of the survivor, a court of Equity will enforce a performance of such agreement.(*i*) And with respect to the second class of captious bequests, it should seem that *A.'s* legacy would vest immediately upon *B.* signifying his assent; and nothing is more frequent in practice, than dispositions in trust for *A.* for life, with a limitation after *A.'s* death to such persons as he shall appoint; the validity of which limitation has never been questioned.

4. Of subsequent conditions.

A subsequent condition is, where any estate or interest is so given as to vest immediately in the legatee, subject only to be devested by some act or event at an after-period.(*k*) Technical words are not required to create such a condition; it will be sufficient, if the testator appear, from the contents of his will, to have intended an immediate interest to pass to the object of his bounty. In addition to the instance given in the beginning of this chapter of a subsequent condition, the following examples are produced.

If a legacy be given to *A.*, to be paid at twenty-one, and if he die under that age, then to *B.*; the interest of *A.* will vest immediately upon the death of the testator, subject to be devested upon *A.'s* demise under twenty-one.(*l*)

So in the case of a bequest to *A.* generally, and if he die before *C.*, then to *D.* The legacy will vest in *A.* immediately, liable to be devested upon the happening of the contingency.

Also, if a legacy be given to *A.*, payable at twenty-one or marriage, but if he marry under that age without the consent of executors, then to *C.*, the legacy will vest immediately in *A.*, and the condition is subsequent.(*m*)

It is to be remarked, that although by the Civil and Common laws it is the general rule that precedent conditions must be literally performed, still that rule is not so rigorous, at least in the Civil law, as not to admit of exceptions, when the conditional terms are so far complied with as to fulfil the intention of testators in imposing the conditions.(*n*) Whereas, in conditions subsequent, since they are in defeasance of interests already vested, courts of law and equity are

(*i*) Lord *Walpole* v. Lord *Orford*, 3 Ves. 402. *Hinckley* v. *Simmons*, 4 Ves. 160.
(*k*) See *Ughtred's* case, 7 Rep. 10 a.
(*l*) *Nicholls* v. *Osborn*, and *Taylor* v. *Johnson*, 2 P. Will. 420. and 504. And see *ante*, Chap. X. sect. 5. p. 403.
(*m*) *Garret* v. *Pritty*, 2 Vern. 293.
(*n*) Swinb. pt. 4. sect. 7. art. 4. Voet ad Pand. lib. 28. tit. 7. s. 25. Cod. lib. 6. tit. 46. Dig. lib. 32. tit. 1. lex. 11. s. 11.

strict in requiring the *very* event to happen, or the act to be done, with all its particulars, which is to defeat the interest previously vested. As this has been shown in the tenth chapter,(*o*) we shall proceed to treat—

Sect. II. Of the Performance of Conditions.

1. Of performance, when the conditions are *precedent*.

A.—When the performance is not within the time mentioned in the condition.

Where a condition is precedent, it ought regularly to be strictly performed in the manner required, as before observed; yet it seems, that both by the Civil law and by our own, if the testator's intention be satisfied by an execution in substance, i. e. *cy pres*, the performance will be sufficient. The Civil law held, inconsistently indeed with its admitted exceptions to the general rule of strict performance, and which are hereinafter noticed, that where 100*l.* was given to *B.* if he paid *C.* 20*l.* within a certain period, and *C.* died before the time; payment to his executors upon the day would be insufficient.(*p*) It seems, however, that the Common law would not require such a literal performance of the condition, but permit the execution of it *cy-pres;* viz. by allowing payment of the 50*l.* to *C.'s* executors to be a good performance;(*q*) and it is presumed that a court of equity would hold the same doctrine.(*r*)

Upon a similar principle with that of *cy pres* performance, the Civil law has admitted of a very extensive limitation to its general rule of strict performance; *viz.* in all cases where it is apparent that testators paid more regard to the *end* or fulfilment of the condition than to the *means* prescribed for the execution.(*s*) So that, if *A.* bequeathed a legacy to *B.*, in case he erected a monument for *A. within three days* after *A.'s* death; although *B.* should not *literally* comply with the condition, yet he would be entitled to the legacy upon building the monument within a reasonable time, since the erection would be considered as the motive and essence of the bequest, and the time appointed for the building but a mean to expedite the business.(*t*) And it is presumed that courts of equity would act upon the same principle in similar cases.

Thus in *Simpson* v. *Vickers*,(*u*) Mr. *Simpson* bequeathed to his brother *Michael* 1000*l.*, to be paid *within six calendar months* after his (the testator's) decease, upon his then executing to the executrix a release of all claims and demands; and if he refused or declined to do so, the testator revoked the bequest, appointing his sister *Elizabeth* sole executrix. It seems that *Michael* did not give the release within the time prescribed; nevertheless Sir *W. Grant* declared him to be entitled to the legacy, upon his releasing all demands.

So in *Taylor* v. *Popham*,(*x*) Mr. *Taylor* bequeathed to his son *Paris* two annuities of 100*l.* and 200*l.* There being subsisting accounts between them, the testator gave to *Paris* 600*l.* a year, upon

(*o*) *Ante*, p. 414. and see *Jones* v. *Suffolk*, 1 Bro. C. C. 529. *Jones* v. *Bromley*, 6 Mad. 137. (*p*) Swinb. pt. 4 sect. 7. (*q*) Co. Litt. 205, b. (*r*) 2 P. Will. 613. (*s*) Swinb. pt. 4. sect. 7. art. 4. (*t*) Swinb. pt. 4. sect. 6. art. 10.
(*u*) 14 Ves. 341. 348.
(*x*) 1 Bro. C. C. 168. and see *Franco* v. *Alvares*, 3 Atk. 342. in which the Court held that the *bill* filed *within* the time was a sufficient performance.

condition that he *within three months* executed a release of all demands on his estates, stating his assurance that there was nothing due to him on those accounts. A release was tendered to *Paris*, which improperly included the two annuities, and he refused to execute it. The persons beneficially interested under the will insisted that, by such refusal, *Paris* had broken the condition upon which he was to take the annuity of 600*l.* But he contended that he was not obliged to execute a release, until the accounts were taken and settled, and the balance ascertained. It appears, however, that the three months elapsed, and no release was given. Lord *Thurlow* determined, that the tendered release being improper, *Paris* was not obliged to execute it. He was also of opinion, that *Paris* was not entitled to have the accounts taken, since it appeared to have been the clear intention of the testator to prevent that proceeding, or to give any election to *Paris*.(*y*) And notwithstanding the expiration of three months mentioned in the condition, his Lordship gave liberty to *Paris* to execute a release, which he having refused to do it was declared that he was not entitled to the 600*l.* a year.

Such determinations as the last upon precedent conditions do not appear to be founded upon relief against forfeiture, as is generally supposed, but upon the principle of their having been *substantially* performed within the meaning of the testator's imposing them. When the condition is precedent, there is nothing to forfeit, since no interest can vest previously to the *literal* or *substantial* performance of the condition. The question in all those cases appears to be, have the conditions been duly performed? In resolving such questions, it is presumed that the following distinction is material to be regarded. When there is no disposition upon non-compliance with the terms of the condition, either *in time* or collateral circumstances, a liberal construction is to be put upon the performance, under authority of the testator's intention, inferred from the absence of any disposition over, that he meant the legatee to receive the legacy, upon the condition being performed *cy près*, or in substance, as in the preceding cases. But when there is a limitation over of the legacy on non-compliance with its specific terms, the construction is less liberal, a strict and literal performance being required; as it is presumed, from the disposition over of the legacy to another person, that the testator meant, if the terms which he imposed were not literally fulfilled, the second object of his bounty should succeed to the bequest by way of conditional limitation. That this is the true principle applicable to these subjects will appear, if we proceed to consider the cases establishing the proposition.

That the times appointed for performing conditions may be so material to be observed, as for ever to prevent the title of the legatees, upon their permitting the periods to elapse without a performance. In illustration of this—

Suppose a condition, upon which a bequest is made, depends upon the legatee (then abroad) returning to *England* within *three* years, and personally applying for his legacy. His arrival in this country within that time is essential to his title; and if he omit to

(*y*) But Lord *Northington* held in *Vernon* v. *Bethell*, that the filing of such a bill for the purpose of election was a forfeiture, 2 Eden, 110. 114.

do so, then, although he may shortly afterwards return, and for the first time receive notice of the bequest, and upon that information make immediate application for the legacy, the defect in the literal performance of the condition cannot be remedied; and for the following reasons. The time allowed for performance is not, as in the instances before given, a mere secondary consideration, but it seems to have been in the particular contemplation of the testator at the date of his will, and intended by him to be punctually observed. Being uncertain whether the legatee was living, or should be so at his death, and wishing to benefit him if he happened to be then in existence; the testator, for the convenience of his executor, might have required the personal appearance of the legatee within the above period, which he considered a sufficient allowance for that purpose. A court of equity, therefore, cannot upon any rational principle enlarge the period for claim, which the testator himself thought proper to determine.

Accordingly, in the case of *Burgess* v. *Robinson*,(*z*) the testator bequeathed 200*l.* charged upon his real estate, to each of his three nephews, to be paid to them as soon as they arrived in *England*, or claimed the same, *provided* the claim was made *within the first three years* next after his decease. And the testator directed, that if only two of his nephews so arrived or made their claims within the above period, each of them was to be paid 250*l.*; but if only one arrived and claimed he was to receive 400*l.* and the residue was to be considered part of his (the testator's) residuary estate; so also was to be considered the sum of 500*l.* (part of the three legacies,) if neither nephew arrived in *England* nor made claim within the time before mentioned. The testator then disposed of his residuary property. None of the nephews literally complied with the condition. And it appeared that one of them came to *England* at the end of *four* years, subsequently to the testator's death; after which, being informed for the *first* time of the will, he claimed the benefit intended for him by the testator. But Sir *W. Grant* M. R. determined against his title; observing, that the testator having imposed on the legatee a condition, with which he had not complied, although the non-compliance was the effect of the latter's ignorance of the provision, yet the consequence must be that he was not entitled to the legacy.(*a*)

In a preceding case, Lord *Eldon* acted upon the principle before stated, and in conformity with the last determination, holding that the legatee's arrival in *England*, and *personally* claiming the legacy *within the time* and *in manner* prescribed by the condition, could not be dispensed with.

The case alluded to is *Tulk* v. *Houlditch*,(*b*) in which the testator gave his son *John*, at *Malaga*, in *Spain*, a specific legacy of 2000*l.* stock, stating, that as he had not heard from *John* for a considerable time, and the probability was that he was then dead, he therefore declared the legacy to be given upon condition that *John* should not be entitled to it unless he returned to *England* and *personally* claimed it from his executors or administrators, or in the

(*z*) 3 Meriv. 7. 1 Mad. 172.
(*a*) Not so by the Civil Law. Swinb. pt. 4. sect. 14. art. 15.
(*b*) 1 Ves. & Bea. 248. 259.

porch of the parish church at *Waltham*, in the *presence* of two witnesses. The testator then directed, that if *John* did not return and make such claim within *seven years* after his decease, he should be presumed to be dead, and the legacy considered to be lapsed, and fall into the residue. The executors were ordered to continue the stock in the *bank* for the above period after the testator's death, until sufficient proof was produced of the demise of *John*, or until it should be claimed by him, within the time, in manner before required. And the intermediate dividends were to accumulate, which, with the capital, were to be paid to *John*, in case he claimed the legacy in the manner and within the period before stated, or the whole was to belong to the residuary legatee. *John* was living at the date of the will, and did not return to *England*, but died at *Malaga* within seven years from the death of the testator. He was regularly informed of the bequest, and intended to comply with its terms, but was prevented by the illness which occasioned his death. His executor claimed the legacy, contending that it was meant for *John* if he happened to be living, a fact which being clearly ascertained in the affirmative, although not in the manner prescribed by the testator, the substantial part of the condition was performed, which entitled the personal representative of *John* to the legacy. In support of the argument, the civil law was referred to; but Lord *Eldon* determined against the claim, and said. "I think this legacy is not due under the circumstances. The cases cited from the Civil law are distinguished in this respect. In those cases where the legacy was considered due, the *means* by which the party appeared to be living were not thought to be essential, if the fact were otherwise established it was sufficient; but there is in *this* will language plainly showing that the testator did not mean the legacy to be taken, unless the fact that the party was living was pointed out by the means by which the testator required that demonstration. The consequence is, that the bill must be dismissed without costs."

The two cases of *Simpson* v. *Vickers* and *Taylor* v. *Popham*, before mentioned,(*c*) are examples of strictly precedent conditions, and in which the Court of Chancery considered the periods for executing releases as merely ancillary to the accomplishing of those objects, and the procurement of those instruments the end and substance of the conditions. The two other cases last stated were determined upon particular circumstances connected with the times of performance, and which could not be in the least departed from, consistently with the obvious intention of the testators; yet the legacies were limited over upon non-compliance with the particulars enumerated in the conditions, circumstances which, it is presumed, would of themselves, in ordinary cases, have procured similar decrees in favour of the second class of legatees. However, the decision of Sir *W. Grant* in *Simpson* v. *Vickers*, upon the will of Mrs. *Simpson*, establishes the proposition, that in cases where there is a *limitation* over of the legacy or devise, upon the legatee or devisee not performing a condition within the time prescribed for that purpose, if the terms be not literally complied with, the condition will

(*c*) *Ante*, p. 514.

be held not to have been performed within the intent and meaning of the testator. Mrs *Simpson* devised to her brother *Michael* (who was her heir) all her real estates, upon the express condition that he, *within six calendar months* next after her death did, at his own expense, make and execute, or deliver, or tender to her executor a good release for 1000*l.* bequeathed to him by her brother *John*, and of all other demands upon *John's* or her estate on account of her executorship under the will of *John*. But if *Michael* refused or *neglected* to comply with the condition, she declared that at the end of the six calendar months, the devise to him should become void; and from that period she devised her real property to her sister *Sarah*, whom she appointed executrix. *Michael* contested the validity of the will, a circumstance which he brought forward in excuse for his omission to execute a release within the six calendar months next after the death of the testatrix. But *Sarah* (the devisee over) contended, that as the estates were only devised to *Michael* in the event of his giving the release within the above period, and upon his neglect to do so, then to her *(Sarah)*; she became entitled to those estates upon his non-performance of the condition, by the express *limitation* of the testatrix. And so Sir *W. Grant* determined, and said that the devise being a *conditional limitation*, and not a strict condition, and the event having literally happened upon which that limitation depended, *Sarah* was entitled to the estates. And his Honour declared, that *Michael*, not having complied with the condition of giving a release, was not entitled to the benefit of the devise made upon that condition.(*d*)

B.—From what period the time for performance is to be computed.

In calculating the time by *months*, when that word is mentioned generally in the condition, the computation is to be made by *calendar* not by *lunar* months.(*e*) But from the carelessness of legatees, it may happen that they may neglect to fulfil the terms of the condition, until it become a question, whether they have performed that obligation in due time. The point has arrived at that nicety as to require a decision whether the period for computing the space allowed to perform the condition commenced from the day of the testator's death, or that day was to be excluded. The rule is in this, as in other cases, that the day of the death is inclusive or exclusive, as will best answer the intention of the testator.(*f*) An example where that day will be considered exclusive may be thus given:

Suppose a bequest to *A.* if within six calendar months after the death of her brother, she give the security required by the will, and the testator to die on the 12th of *January* 1805, and the security to be given on the following 12th of *July*. The condition will have been performed, for the computation is to be made upon and from the day next after the testator's death. Such was the case of *Lester* v. *Garland*,(*g*) decided by Sir *W. Grant*, M. R.; and upon this reasoning. The day is a sort of indivisible point, so that any act done in the compass of it is no more referrible to any one, than to

(*d*) 14 Ves. 341. and see Lord *Beaulieu* v. Lord *Cardigan*, Ambl. 533. Reported 1 Eden, 349, and commented upon by Sir *W. Grant*, in the last case p. 347.
(*e*) 3 Atk. 346.
(*f*) "Law of Husband and Wife," vol. 1. p. 99.
(*g*) 15 Ves. 248.

any other portion of it; but the act and the day are co-extensive, and therefore the act cannot properly be said to be passed until the day is passed. Such is the technical rule. That rule then forbidding, in the present case, the *hour* of the testator's death to be considered as the *time* of it, since that would be making a fraction of a day, it follows that the *day* of the *death* must be the time of it, and that time must be past before the six months can begin to run, which makes the commencement of the period the day following the death of the testator.

C.—When the legatee has the whole of his life to perform the condition.

When no period is appointed by the testator for performance of a condition, the legatee will, in general, have the whole of his life to fulfil the terms of it. In this the Civil law and the rule in equity coincide, so that if a legacy be given to *A.* if he pay 10*l.* to the poor of a particular place, *A.* will be allowed by the Civil law the whole of his life to make the payment;(*h*) and an instance where a court of equity made a similar decision occurred in the following case:

In *Randal* v. *Payne*,(*i*) Mr. *Walsh*, after giving legacies to *Jane* and *Martha Wood*, declared, that if either of them married into the families of *Gosling* or *Rivington* and had a son, he gave all his estate to such son for life, &c. but if they should not marry, the estate was to go the plaintiff for life, &c. The *Woods* married, but not into the families before named, and the question was, whether, upon such marriages, the plaintiff had not a right to the estate? Lord *Thurlow* determined in the negative, on the principle that nothing could vest in the plaintiff until the contingency of the *Woods* not marrying into the particular families became impossible, which could not be decided during their lives, for while they lived, there was a possibility of their performing the condition; consequently the claim of the plaintiff was premature.(*k*)

In the last case it was obviously the intention of the testator, that if either daughter married into the families of *Gosling* or *Rivington* and had a son, that son was to have all his estates; a circumstance which showed his intention, that those estates were not to go over, while the happening of the above event was possible, and which therefore necessarily continued during the lives of each daughter; so that although the daughters might marry into other families than those prescribed, as was the case, yet as their husbands might die and one of the widows marry into one of the families pointed out by the testator, and have a son, the first marriages were not allowed to be a determination of the condition, so as to entitle the person in remainder to the estates upon those events taking place.

But when it appears to have been the testator's intention, that the condition should be restricted to the first marriage of the legatee, that intention will prevail, as in the following case:

Mr. *Lowe*, after devising all his real estates to trustees, bequeathed a portion of 10,000*l.* to his daughter *Charlotte*, one half of it, to be paid upon her marriage, and the remainder in one year afterwards, on condition of her marrying with the consent of any two

(*h*) Swinb, pt. 4. sect. 14. art. 11.
(*i*) 1 Bro. C. C. 55.
(*k*) See *Page* v. *Hayward*, 2 Salk. 570. 8vo. ed.

of his executors, &c. But if she married without such consent, one of his three kinsmen, *William*, *Thomas*, or *John Drury*, he gave to that one kinsman particular estates upon his taking the name of "*Lowe*," and if that circumstance did not take place with *Charlotte*, he directed it to be offered to his daughter *Ann* in every particular; and if neither daughter married as aforesaid, he gave the estates to his kinsman *William Drury* and his heirs male for ever, upon his and their taking the name of "*Lowe*." *Charlotte* married, with the consent of the testator, a person *not* one of the three kinsmen named in the will, and she received a marriage portion, and then the testator made a codicil and revoked all the devises and bequests in his will in favour of *Charlotte*, and all the claim and right which her husband might have to any of the testator's real or personal estates, in consequence of the marriage. An act which showed the testator intended, that the condition of either of his daughters marrying one of his three kinsmen, was to be confined to their first marriages; for in lieu of such claim and right, the testator gave to each child of the husband by his daughter (except an eldest or only son) a pecuniary legacy. And by the same codicil the testator declared, that if his daughter *Ann* married any of the three persons named in his will, then, on condition that such person and his heirs should take and use the name of *Lowe* only, such person should be entitled to all his real and personal estates absolutely. But if his daughter *Ann* should not marry any of those persons, or marrying one of them he refused to take and use the name of *Lowe*, the testator revoked all the devises and bequests he had made to *Ann*, and gave to her 10,000*l*. *Ann*, after surviving the testator, married, but not one of the three kinsmen of the testator, and on that occasion she was paid the 10,000*l*.; and although it was urged that her husband might die and she afterwards marry one of those three persons, yet the Court of *King's Bench* was of opinion, that the remainder over to the plaintiff *Drury* (who had taken the name of *Lowe*) irrevocably took place.(*l*)

D.—Right of executors to perform the condition.

Where the condition gives an *option* to the legatee to perform one of two or more things, *within a particular period*, previously to the vesting of the bequest, if the legatee die before the expiration of the time without having *elected*, the right of election may be exercised by his executors.

Accordingly in *Eastwood* v. *Vinke*,(*m*) the testator upon his marriage gave a bond to his wife's trustee, with a condition, that if he, *within four months*, settled and assured freehold lands of the yearly value of 100*l*. upon his wife for life, or if his heirs, executors, or administrators should, within the same period after his death, pay to her 2000*l*. the bond was to be void. The testator died within the four months without making such settlement and the widow claimed the 2000*l*. but it was contended against her demand, that as the testator died within the period allowed for his election, that right devolved upon his executors. And the *Master of the Rolls* was of that opinion, ordering the executors to pay the incoming profits of the 100*l*. *per annum* to the widow from the

(*l*) *Lowe* v. Sir *William Manners*, 5 Barn. & Ald. 917. (*m*) 2 P. Will. 613. 617.

death of her husband, and to settle upon her that annual sum, and he declared them not to be bound to pay her the 2000*l.*

Another instance, where executors will be entitled to perform the condition omitted to be executed by their testator, the legatee, may occur under the following circumstances:

Suppose *A.* bequeathed to *B.* 100*l.* upon condition that he *and* his executors dispose of certain goods. Now, as *B.* can have no executor while he lives, the latter member of the condition was impossible. The condition, therefore, must be considered in the disjunctive, so as to enable *B.* during life, or his executors afterwards, to perform the condition.(*n*)

E.—Where legacies are given to executors or trustees.

When bequests are made to individuals, in the character of trustees or executors, and not as marks of personal regard only, the legacies are held to be given upon an implied condition, viz. that the persons named clothe themselves with the character in respect of which the benefits were intended for them. Thus a trustee must except the trusts, when called upon to act in their execution:(*o*) and no rule is so clear, as that if a legacy be given to a man *as executor*, whether it be expressed for care and pains *or not*, he must, for the purpose of entitling himself to the bequest, invest himself with the character of executor.(*p*) If he prove the will with an intention to act under it, that will be a performance of the condition; or if he unequivocally manifest an intention to act in the executorship, as in giving directions about the funeral of the testator, and be prevented by death from further entering upon his office, that also will be a performance of the condition.

Accordingly in *Harrison* v. *Rowley*,(*q*) Mrs. *Alsager* bequeathed to her executors and trustees, 100*l.* a-piece, for their care and loss of time in the execution of the trusts, together with their reasonable expenses, when called from home on that account. *Judith*, the sister of Mrs. *Alsager*, made a testamentary disposition to the same effect, as that just mentioned, and appointed the same persons her executors. *John Ford*, one of the executors and trustees, survived the testatrixes so short a time, that he was prevented from joining with his co-executors in proving the wills, but he concurred with them in giving orders respecting the funeral of Mrs. *Alsager*, and he acted in the trusts of both wills, in directing payment of burial fees, the expenses of making the coffins and opening the vault. Under those circumstances, the executors of *Ford* claimed the legacies under each will; and Lord *Alvanley*, M. R. determined in their favour, upon the principle, that *Ford* showed as much as any person could do, his intention to undertake the trusts, and that his being prevented by death from executing them ought not to prejudice his title to the legacies.

Also in *Humberston* v. *Humberston*,(*r*) the testator, as encouragement to his executors to accept the trust and executorship, gave to each of them 100*l.*, and 12*l.* a-piece for mourning and rings, and 10*l.* a year for their trouble. The executors did not act; and Lord *Cowper* was of opinion, that they were entitled to the rings and mourning as *personal* gifts, but not to the annuity or legacy of 100*l.*

(*n*) 2 Roll. Abr. 450, pl. 11. (*o*) See *Brydges* v. *Wotton*, 1 Ves. & Bea. 134.
(*p*) 4 Ves. 216. (*q*) Ibid. 212. (*r*) 1 P. Will. 333.

The conduct of an executor, *after proving* the will, may be of such a kind as to demonstrate that, instead of a *bona fide* intention to execute the trusts, he procured probate as a mean of enabling him to violate, in the grossest manner, the confidence reposed in him by the testator. In such a case, the mere act of proving the will cannot entitle him to the legacy meant for him.

In *Harford* v. *Browning*,(*s*) Mr. *Morris* (one of four executors) had a legacy of 1500*l.*, and an annuity of 100*l.* given to him by the testator, upon proving the will, and taking on himself the execution of it. *Morris* concurred in the probate, and shortly afterwards eloped with and married abroad *Frances*, the infant daughter of the testator, who was beneficially interested under the will. With the exception of probate, *Morris* never acted as executor, and, in consequence of his misconduct, he was restrained by the Court of Chancery from interfering in the trusts of the will. And Lord *Thurlow* determined, that *Morris's* concurrence in the probate under those circumstances, did not entitle him either to the legacy or the annuity.

Bequests to individuals, who are executors, are considered *primâ facie* to be given to them in that character; a presumption to be repelled by the nature of the legacies, or other circumstances arising in the will. And when it is once settled, that the bequests are made to them as executors; if they renounce the trusts, refuse to act or are guilty of culpable neglect in not undertaking the executorship,(*t*) and die before taking upon themselves the trusts, the condition upon which the legacies are given being not performed, they cannot be claimed.

In *Read* v. *Devaynes*,(*u*) legacies were given to persons by the description of "my very good friends;" who, in another part of the will were desired "to act as executors." A Mr. *Smith*, one of those persons, said in his answer, that he had not proved the will nor acted as executor, but he, notwithstanding, claimed the legacy. The *Master of the Rolls* declared, that an executor so appointed could not claim the legacy, without acting, or at least without having proved the will.

So in *Abbot* v. *Massie*,(*x*) the bequest was of 50*l.* to Mr. *Massie*, and *W. G.* "as executors; *W. G.* refused to act, but claimed the legacy. And Lord *Rosslyn* said, "as to the 50*l.* it is impossible it can be allowed, because it is given to him as executor, and he did not prove the will."

Also in *Stackpoole* v. *Howell*,(*y*) the testator devised his real and personal estates to the plaintiff and the defendants *Howell* and *Mabberley*, upon various trusts, and appointed them executors. This testator made two codicils, by which he gave to those three persons legacies, not expressly as trustees or executors, but by their names and descriptions; and the legacies by the first codicil were classed together, and of equal amounts, as were those in the second. The plaintiff renounced probate, and he nevertheless claimed the legacies, but without success. Sir *W. Grant* said, the question was, whether it was not necessary to find circumstances to show, that the

(*s*) 1 Cox, 302. (*t*) 4 Ves. 216. (*u*) 3 Bro. C. C. 95.
(*x*) 3 Ves. 148. (*y*) 13 Ves. 417.

legacy was intended for the executor in a distinct character? otherwise it was the *primâ facie* presumption, that it was given to him as executor. His Honour remarked, that there was something in the circumstances, that the testator had put those legacies together, and that, in both the codicils, the legacies to the executors were precisely of the same amount. It seemed to him, as if the testator considered the legatees in the character of executors, and he therefore thought the plaintiff was not entitled.

The recent case of *Dix* v. *Reid*,(*z*) is an instance, wherein the legacy was considered not to be given to the legatee in his character of executor; and accordingly, he was decreed entitled to the legacy, notwithstanding his renunciation of probate. In that case, a testator bequeathed thus: "I give to *William Reid* and *John Baugley* 50*l.* each, whom I nominate and appoint executors in trust to this my will.: the said bequests to be upon condition of their taking upon them the trusts hereinafter mentioned." In a subsequent part of the will, the testator added, "I give unto my cousin *Thomas King* the sum of 50*l.* whom I appoint as joint executor in trust in this my will." *Reid* and *Baugley* proved the will: but *King* declined proving it, and did not interfere in the trusts. It was insisted he was not entitled to the legacy of 50*l.* The Master reported the legacy to be due, but an exception was taken to the report. And Sir *John Leach*, V. C. over-ruled the exception, observing, that he considered the gift rather intended in respect of the legatee's relationship, than of his office. The circumstance that the two other executors had the same legacies could not be brought in aid of the exception, because those legacies were expressly annexed to the office of trustees. His Honour, however, considered the case as very doubtful. *Primâ facie* legacies to executors were considered as annexed to the office, and they were to show circumstances to repel the presumption.

With respect to precedent conditions in restraint of marriage, their performance in connexion with subsequent conditions of the same kind will be separately treated of under the third subdivision of this section.

We shall next consider,—

2. The performance of conditions which are subsequent.

Those conditions are construed with great strictness, as they are intended to divest estates already vested. It is, therefore, required, as previously observed, for the very event to happen, or the act to be done with all its details, in order to deprive the legatee of his legacy.(*a*)

A.—It is a consequence from this rule of construction, that if the *subsequent* condition cannot be performed from being *impossible* or *illegal*, the condition is void, and the legacy single and absolute.(*b*)

Accordingly, in the case of Sir *James Lowther* v. Lord *Charles Cavendish*,(*c*) the testator, after settling his real estates in *Cumberland* on the plaintiff in tail, expressed a desire that his burgage tenures in *Cockermouth* should be limited in the like manner. He therefore devised them to Sir *William Lowther* in fee. The testator then signified his opinion, that it would be right for the plaintiff to have

(*z*) 1 Sim. & Stu. 237.
(*b*) Co. Litt. 206. Plowd. Com. 132.
(*a*) See *ante*, p. 414. *et. seq.*
(*c*) Ambl. 356. 1 Eden, 99. *S. C.*

all the estates of Sir *William* in *Cumberland*, and for the latter to have all the plaintiff's estates in *Yorkshire*. In order to accomplish that purpose, the testator gave 30,000*l.* stock to trustees, in trust for the plaintiff to receive the dividends, *until* Sir *William* conveyed to him in fee all the *Cumberland* estates, and the plaintiff had made over the *Yorkshire* estates to Sir *William;* which, if either of them refused or neglected to do within eight months after the plaintiff came of age, such person should not have any part of the stock; but if the exchange were completed by both of them, that fund was to be divided between them; and he appointed Sir *William* sole executor and residuary legatee. Sir *William* died before the exchange could be made, in consequence of the infancy of the plaintiff; and the defendant, the executor and residuary legatee of Sir *William*, claimed the 30,000*l.* upon the ground, that in the event which had happened, the fund was undisposed of, and formed part of the residue bequeathed to Sir *William*. On the other hand, the plaintiff claimed the stock, upon the principle, that he took a vested interest in it at the testator's death, only to be devested upon his neglect or refusal to concur in the exchange, neither of which circumstances could be imputed to him. And, since the exchange had become impossible by the act of God, the bequest to him, which was originally qualified, became single and absolute. And of that opinion was Lord *Northington*, C. and directed accordingly.(*d*)

B.—There is a species of illegal conditions termed *repugnant*. They are so called from their inconsistency with the interest of legatees in the subjects of bequest, *i. e.* from the imposition of restraints incompatible with the enjoyment of the legacies in so large and ample a manner as the law allows, when dispositions are so made. This may happen, where the condition restrains a legatee from spending or disposing of his legacy, when *his interest* in it is *absolute*. Such condition being void, the observance of it is unnecessary.(*e*) The following is an example of this class of conditions:

In *Bradley* v. *Peixoto*,(*f*) the testator bequeathed to his son *Henry Bradley* the dividends of 1620*l.* bank stock for his support during *life;* and at his death the principal and interest where given to his "heirs, executors, administrators, and assigns." But if he attempted to dispose of all or any part of the stock, such attempt should exclude him from any benefit under the will, and be a forfeiture, and the fund should go to the testator's other children. *Henry* claimed the legacy discharged from the condition, upon the ground, that the restriction was repugnant to the absolute interest which he took in the fund. And Lord *Alvanley*, M. R. was of that opinion; observing, "it was a rule long established, that, where there is a gift with a condition inconsistent with and repugnant to such gift, the condition is wholly void.

It is stated at the conclusion of the report of the last case, that, upon a similar disposition of stock by the same will the Lord *Chan-*

(*d*) See *Keates* v. *Burton*, 14 Ves. 434. stated *ante*, p. 416. *S. P.* also *Aislabie* v. *Rice*, 3 Mad. 256. stated *infra*.

(*e*) With respect to conditions of this description, see Co. Litt. 146. 206. 222. 223. *Mildmay's* case 6 Rep. 43. Hob. 170. *Shailard* v. *Baker*, Cro. Eliz. 744. *Portington's* case, 10 Rep. 38. *Gulliver* v. *Ashby*, 4 Burr. 1929. *King* v. *Burchell*, Ambl. 382. 1 Eden, 434. *S. C.* 8 Term. Rep. 61.

(*f*) 3 Ves. 324.

cellor was of opinion that the interest was absolute, and decreed accordingly.

A prohibition annexed to an absolute bequest, against the legatee's *spending* the money, is equally repugnant to his interest in it, as a general restraint against alienation. The condition, therefore, is void; and a forfeiture will not be incurred by non-compliance with it.

So also, if the absolute estate of the legatee be made defeasible, upon his not disposing of the fund during life, the condition will be repugnant to the interest previously given and vested in him. For where *absolute* property is once given to an individual, it cannot be subjected during his *life* to a condition, that if he do not use or dispose of it, his interest shall cease, and go over to another person.

In *Ross* v. *Ross*,(*g*) the testator gave to his son *James Ross* 2000*l.* to be paid to him at the age of twenty-five, or at any time between the ages of twenty-one and twenty-five, if his executors thought proper; the intermediate interest to be applied for *James's* support and education. But if *James* should not receive or dispose by will or otherwise, in his lifetime, of the money, it should return and be paid to the heir in tail for the time being in possession of a particular estate. *James*, after surviving the testator and attaining the age of twenty-five, died *intestate*, not having received the 2000*l.* And Sir *Thomas Plumer*, M. R. was of opinion, that the condition or proviso was repugnant and void; an opinion, which procured a decree for the legacy in favour of the administrator of *James*, in preference to the heir in tail, the legatee over.

It will have been noticed in the perusal of the last cases, that they prove, where the conditions are subsequent, and either impossible or illegal, although there be a limitation over of the legacies upon non-compliance with the terms, still the interests or the original legatees remain undisturbed and absolute; the bequests being considered the same as if no such conditions had been annexed.(*h*)

It is presumed, upon the principle of the last cases, that if a legacy were given to *A.* for life, with a proviso for its determination if *A.* made any disposition of his life interest, the condition would be repugnant and void. For to such an estate the *jus disponendi* is incident by law, and cannot be *totally* forbidden.(*i*)

The decision before considered being founded upon the inconsistency between the property in the subject bequeathed to the legatee, and the qualifications and restraints attempted to be annexed to it, it follows, that a condition, restraining the disposal of a legacy, will be good, when the gift and restraint are not repugnant.

Suppose, then, a bequest to *A.*, either absolutely or for life, but if he dispose of his interest to a *particular person*, the bequest to him shall cease, or the property shall go to *B.* The condition is valid; for it does not prohibit *A.* from making any disposition of his interest,

(*g*) 1 Jac. & Walk. 154.
(*h*) And see Co. Lit. 206. 223. see also *Poor* v. *Mial*, 6 Mad. 32.
(*i*) 18 Ves. 433. 1 Rose, 99.

but merely imposes a *partial* restraint upon him, which may be equitable and proper.(*k*) Upon the same principle, if a legacy were given to *B.*, to be paid at twenty-five, provided, if he aliened the same *before that age*, his interest should cease, and go over to *C.*; the condition is good; and if not observed, *C.* will be entitled to the money.(*l*)

So, when it appears that the proviso against alienation by a legatee for *life* was not meant to operate as a strict condition, in derogation of the legal powers and incidents to that estate, but as a conditional limitation,(*m*) determining his interest, and giving it to another person upon alienation; in that case, if the legatee do not comply with the terms of the bequest, his interest will cease, and go over as directed by the will. Lord *Eldon* expressed himself on this subject to the following effect: "If property be given to a man for life, the donor cannot take away the incidents of a life estate. A disposition to a man, *until* he shall become a bankrupt, and after bankruptcy over, is quite different from *an attempt* to give to him for his life, with a *proviso* that he shall not sell or alien it. If *that condition* be *so expressed*, as to amount to a *limitation*, reducing the interest short of a life-estate, neither the man nor his assignees can have it beyond the period limited."(*n*)

The above sound distinction between condition and limitation appears to reconcile all the authorities relating to testamentary questions upon this subject. Whether the restriction be condition or limitation must be decided by the intention of a testator, as collected from his will.(*o*) And it should seem, that if the restraint be a *condition*, then, since a condition not to alien is repugnant and void, the bankruptcy of the legatee, any more than his own particular disposition, cannot be a forfeiture. On the other hand, if the restriction be a *limitation;* then, whether the alienation be by the act of the party,(*p*) or by operation of law, as in consequence of bankruptcy, the interest will determine. In truth, there seems to be no foundation for the distinction said to exist in some of the cases, between the voluntary alienation of the legatee being a forfeiture, and the disposition by act of law being no forfeiture; for in each instance, the legatee is the author of the alienation intended to be prevented by the testator, by whatever means effected. In the one case, it is occasioned by his own direct and immediate act; and in the other, by involving himself in debt, which gives rise to the disposition of his interest by act and operation of law. Hence it seems fair to conclude, that, where the interest bequeathed to a person is made to cease upon his alienation, not as a condition annexed, but in limitation of its continuance, the interest will determine, whether the legatee directly make the disposition, or the law does it for him in consequence of his own preceding acts. We shall now examine the cases, to ascertain how far they support the above observations.

In *Dommett* v. *Bedford*,(*q*) a case sent out of Chancery for the opinion of the Court of *King's Bench*, the testator bequeathed to his nephew, Mr. *Woodham*, an annuity of 30*l.* for life, to be paid half-

(*k*) Litt. sect. 361. Swinb. pt. 4. sect. 13. art. 6.
(*l*) See *Large's* case, 2 Leon. 82. (*m*) *Ante*, p. 502. (*n*) 18 Ves. 433.
(*o*) *Ante*, p. 502. (*p*) *Wilkinson* v. *Wilkinson*, 2 Wils. C. C. 47.
(*q*) 6 Term. Rep. 684.

yearly, and with which he charged his real estate. The testator then gave a strict direction, that the annuity should be paid from time to time to *Woodham* only; whose receipt, under his own hand, and none other, should be a sufficient discharge; the testator's intent being, that the annuity or any part of it should not on any account be aliened for the whole or any period of *Woodham's* life; and if the same should be so aliened, it should immediately cease and determine. *Woodham* became a bankrupt after the death of the testator; and the commissioners assigned the annuity to the assignees. The Judges certified their opinion, that by the bankruptcy and assignment the annuity ceased and determined.

It is observable, the Court did not say that the annuity was forfeited, which it would have done, upon the breach of a *condition*. It declared there was a cesser of *Woodham's* interest in, and a determination of, the annuity. This then was a *limitation*, not a condition. It was the testator's intention that the annuity should continue only so long as *Woodham* could receive it; and that, if in any event he were precluded from so doing, the personal benefit intended for him should determine. The case establishes the following proposition; that a general restraint of alienation includes as well a disposition by act of law, as by the specific act of the person prohibited.

Doe v. *Hawke*(*r*) is a case of similar description with the last. There a farm, held under the Duke of *Newcastle* for twenty-one years, was devised by the testator to his *nephew*, *Abraham Ibbotson*, in the following manner: He gave the tenant-right of it to *Abraham*, he performing the obligations in the lease, "but not to sell or dispose of such tenant-right to any other person. And *if* he *refused* to dwell there himself, or keep it in his own possession, his nephew *John* was to have the tenant-right." After *Abraham* was in possession of the farm, he deposited the lease with a Mr. *Crookes* as a security for a debt, and it was afterwards delivered over to another creditor, who discharged the demand for *Abraham*, and received from him a warrant of attorney to confess a judgment, which was entered up, and execution taken out. Under that execution, the lease was sold, and assigned by the sheriff, and the purchasers (defendants) immediately put into possession of the farm. *Abraham* left the farm on the morning before the sale, and from that day he ceased to dwell there, or to have any possession of it Under those circumstances, *John*, the devisee over, claimed the farm; a claim which was established by the opinion of the Court of *King's Bench*.

The last case was decided upon the devise being a *conditional limitation*, and not simply a condition. It was the clear intention of the testator (and as appeared from the terms of the devise) to give the lease to *Abraham*, so long only as he continued to live on the farm. If he quitted it, his interest was to determine at that period, and to go over to *John*. All that was necessary for *John* to show to complete his title, was the abandonment of possession by *Abraham*. This he was enabled to do, as, from the time of the sale by the sheriff, *Abraham* neither resided on the farm, nor retained the possession of any part of it. The event happened upon

(*r*) 2 East. 481.

which his interest determined, and that of *John* began. Whether *Abraham's* leaving the farm was in consequence of his own voluntary act, or by compulsion of law, was immaterial; since, in either case, he was the author of the necessity; and the terms of the devise were general, positive, and peremptory.

In unison with these decisions, Sir *W. Grant* derermined the case of *Shee* v. *Hale.*(*s*) Mr. *Mootham* bequeathed his residuary estate to trustees, to pay to his son *John* quarterly a clear annuity of 200*l.* for life, "or *until* such time as *John* should sign any instrument whereby or in which he should contract or agree to sell, assign, or otherwise part with the same, or any part of it; or in any way charge the same, or any part thereof, as a security for money to be lent him; or in any other manner charge or dispose of such annuity, or any portion of it, by anticipation; or whereby he should empower, or intend to authorize, any person to receive all or any part of the annuity, except the quarterly payment next after the power or authority was given." The testator then declared, "that if his son should, at any time, sign or execute any such instrument or writing for all or any of the before-mentioned purposes (except as aforesaid,) then and from thenceforth the annuity should cease to be paid or payable to him, and should sink into the personal residue," which he disposed of by a codicil. *John* survived the testator, and having been imprisoned for debt, took the benefit of an Insolvent Act, and inserted the annuity in the schedule of his property. And it was determined that the annuity was at an end.

It appears from the last case, that the annuity was granted *during* the life of *John*, or *until* he assigned it. By the terms of the bequest it was to continue no longer than one of those periods, which ever of them first happened. The devise then was not a condition, but a limitation. The son, therefore, having taken the benefit of the Insolvent Act, and signed the schedule, authorized other persons within the terms of the will to receive the annuity, which necessarily determined the grant of it. And although the Court seemed to notice a distinction between a voluntary alienation, and one by operation of law, *viz.* under bankruptcy, it is nevertheleess conceived, upon the authority of the preceding cases, and those after stated, and the intention of the testator, that had *John* become a bankrupt, the decision would have been the same.

The last case which we shall produce, as decided upon the same principle as the preceding cases, is *Cooper* v. *Wyatt.*(*t*) There Mr. *Herbert* devised his real estate to trustees, upon trust, as to a moiety of it, that they, during the life of his nephew *Samuel*, should receive the rents, and apply a sufficient part of them for the support and education of *Samuel's* children; "and if there should be a surplus," then in trust from time to time to pay and deliver the same into the hands of *Samuel* (but not to his assigns,) during his life, for his own sole use and benefit; and after his death, in trust as to the said moiety, for *Samuel's* children, as in the will mentioned: *provided*, that if *Samuel* should, by any ways or means, sell, dispose of, or incumber the right, benefit, or advantage he might have for life, or any part of

(*s*) 13 Ves. 405.
(*t*) 5 Mad. 482. and see *Wilkinson* v. *Wilkinson*, 2 Wils. C. C. 47.

it, then the right, benefit, and advantage of his said nephew for life, should cease and determine as to him, and be applied for the benefit of his children. *Samuel* survived the testator, and became a bankrupt, and the assignee claimed the surplus rents devised to the bankrupt, notwithstanding the provision contained in the will against alienation; but the children insisted that those rents belonged to them under the limitation over in the will. And the opinion of Sir *John Leach*, V. C. was in their favour.

It appears to have been the testator's intention to limit the rents to *Samuel*, either during life or until alienation. The interest for life was to be reduced to a shorter period, if he disposed of or encumbered it, and in that event the testator substituted the nephew's children in the place of their father, by a limitation over of the rents. The devise, therefore, operating as a limitation, and not as a condition, it was a necessary consequence from the preceding cases, that whether the alienation took place by the voluntary act of *Samuel*, or from his bankruptcy, the event would have happened, upon which his estate in the rents was to cease, according to the terms of the devise, and that of the children was to begin.

The preceding cases are instances where alienations by the legatees were made the periods for the natural expirations of the interests given to them, and therefore not being repugnant to any legal incident belonging to an estate, the provisions against such alienations were adjudged to be obligatory. But where the bequest is of an interest for life to a man, (and it is immaterial whether directly to or *in trust* for him,) and the testator declares his intention that the subject so given shall be to the separate use of the legatee, and not be assignable by him in anticipation or otherwise, and there is no limitation over upon an alienation, the intended restriction being repugnant to the *jus disponendi* legally incident to the estate is void. Consequently neither the voluntary disposition of the life-interest by the legatee, nor the legal disposition of it in bankruptcy, will determine that interest; but in the one case the particular assignee, and in the other, the assignee under the commission, will be entitled to the life estate.

Thus in *Brandon* v. *Robinson*,(*u*) the testator, after devising his real and personal estates to trustees, to sell and divide among his children, who were to take vested interests at twenty-one, directed the share of his son *Thomas Groom* to be laid out in the funds, in the names of the trustees, during the *life* of *Thomas*, and the dividends, as they became due, to be paid from time to time into his own hands or upon his proper order and receipt, subscribed with his own hand, to the intent that they should not be grantable, transferrable, or otherwise assignable, by way of anticipation of any unreceived payment, or any part of it; and that, *upon the death* of *Thomas*, the principal with the dividends should be paid to such persons as would be entitled to *Thomas's* personal estate, as if the share had formed part of it, and he had died intestate. *Thomas*, having survived the testator and attained twenty-one, became a *bankrupt*. His assignee claimed the dividends upon the share which should accrue during the life of *Thomas*, upon the ground

(*u*) 18 Ves. 429.

that the *trust* of the dividends having been declared in favour of *Thomas* for life, the restraint of alienation was repugnant to his interest, and therefore void. Lord *Eldon*, being of that opinion, over-ruled a general demurrer of the trustees to the bill of the assignee.

It is apparent in the last case, that the testator intended his son *Thomas* to take an estate for *life*. There was no declaration that his estate should cease upon alienation, to show that such event was meant to be a period short of a life-interest, at which the bequest was determinable, as in *Dommett* v. *Bedford* before stated ;(*x*) nor was there any limitation over upon parting with it, as in the preceding authorities. But the case was a simple *trust* for *life*, adopted with a declaration that the legatee should not dispose of his interest, which was a requisition repugnant to the estate, and consequently ineffectual. We shall next consider the necessity of observing—

C.—Conditions not to dispute the validity of wills and testaments.

When legacies are given to persons upon conditions not to dispute the validity or the dispositions in wills or testaments, the conditions are not in general obligatory, but only *in terrorem*. If therefore there exist *probabilis causa litigandi*, the non-observance of the conditions will not be forfeitures.(*y*) The reason seems to be this; a court of equity does not consider that the testator meant such a clause to determine his bounty, if the legatee resorted to such a tribunal to ascertain doubtful rights under the will, or how far his other interests might be affected by it; but merely to guard against vexatious litigation.

But when the acquiescence of the legatee appears to be a material ingredient in the gift, which is made to *determine* upon his controverting the will or any of its provisions, and in either of those events the legacy is given over to another person, the restriction no longer continues a condition *in terrorem*, but assumes the character of a *conditional limitation*. The bequest is only *quosque*, the legatee shall refrain from disturbing the will. And, if he controvert it, his interest will cease and pass to the other legatee. As an example of this:

In *Clever* v. *Spurling*,(*z*) a freeman of *London*, after noticing in his will that he had advanced his only daughter in marriage, gave to her 35*l*. provided if she or her husband refused after his death to give a release to his executors,(*a*) or should in anywise trouble or disturb them upon any claim or pretence by virtue of the custom of *London*, the legacy should go over to the children of his deceased youngest daughter. The daughter and her husband claimed by the custom in opposition to the will, but it was insisted, that as the legacy was given over in the event of the legatee or her husband making any claim, or disturbing the executors under pretence of the custom, a right became vested in the legatees over by the claim that had been made, which a court of equity would not divest. And so the *Master of the Rolls* determined.

(*x*) *Ante*, p. 526.
(*y*) *Powell* v. *Morgan*, 2 Vern. 90. *Morris* v. *Burroughs*, 1 Atk. 404. *Loyd* v. *Spillet*, 3 P. Will. 344. (*z*) 2 P. Will. 526. (*a*) Vide *ante*, p. 514.

If, however, the limitation over upon disputing or claiming against the will have none other effect than what the law would produce, if the express disposition had been omitted, the condition will be *in terrorem* only. So that if a legacy, to which such a condition is annexed, instead of being given to a *stranger*, be limited over to his *executors*, who would be entitled to receive it as part of his assets, without any such particular direction, the testator will be considered as meaning no more by the declaration than if he had said nothing upon the subject; and then the bequest falls within the rule of construction before mentioned, in regard to conditions *in terrorem*.(*b*) But if the testator *direct* the legacy to fall into the *residue* upon a breach of the condition, and *dispose* of that fund, the *residuary* legatee will be a *particular* legatee of the individual legacy, and as such be entitled to it if the condition be broken.(*c*)

D.—Where the time of payment of a legacy and the condition to devest it are inconsistent.

When a certain and determinate period is appointed for the payment of a legacy, and it is given over, upon the happening of a contingent event, consistency requires that the devesting clause should be confined within the time when the legacy is payable; for, as the legatee is entitled to the fund, upon the arrival of the period fixed for its payment, and may spend it as his own, if the contingent event afterwards happen, it is ineffectual. So that, if a legacy were given to *B.* to be paid within *six months* after the death of the testator, and it was declared in another part of the will, that if *B. died before* twenty-one, the legacy should go over to *C.*; the contingency of *B.* dying under twenty-one would be restricted to the period of six months after the testator's death. Hence it follows, that if *B.* survived the six months he would be entitled to the legacy, although he might die under the age of twenty-one. An instance of this occurred in the following case:

In *Clent* v. *Bridges*,(*d*) Mr. *Bridges* bequeathed to his two youngest daughters 600*l.* a-piece, to be paid within six months after his decease, declaring, that if both or either of them died under twenty-one, he gave, so far as he might by law, their or her portions or portion to the persons named in the will. *Margaret* survived the six months, and received her legacy; but died under twenty-one, having by will disposed of her personal estate. The question was between the persons claiming under her disposition, and those claiming under the limitation over in the will of Mr. *Bridges*. And it was decided in favour of the former, upon the principle before stated.

The legality of conditions in restraint of marriage was considered in the first section. It is now proposed to ascertain with as much certainty as the cases allow,—

3. When conditions in restraint of marriage will and will not be considered as effectually performed, and when the performance is become unnecessary; commencing with—

A.—Conditions requiring marriages with consent.

It appears from the authorities stated in the beginning of this section, that where conditions are *precedent*, they ought to be fully

(*b*) *Cage* v. *Russell*, 2 Ventr. 352.
(*c*) Vide *Lloyd* v. *Branton*, 3 Meriv. 118. *et infra.* (A. 6.) (*d*) Finch's Rep. 26.

performed; and that the questions in those cases, where the terms have not been literally pursued, are, whether the conditions be *substantially* executed *within the intent and meaning* of the persons imposing them. So it is in instances of conditions requiring marriages with consent of executors or trustees, &c. previously to the vesting of the legacies. The rule of construction is the same, where the like conditions are *subsequent*, with a *limitation over*, upon non-compliance with their terms. For the Court does not *relieve* against *non-performance*, but merely determines whether the conditions have not been *in substance* performed, so as to answer the views and intentions of testators, though not according to the *letter*. We shall endeavour to extract general principles applicable to these subjects, and then notice excepted cases, with the reasons for the exceptions.

(A. 1.)—At *what time* consent ought to be given.

As a general rule, it may be stated, that when the consent of executors or trustees, or the major number of them, is required *to* the marriages of legatees, it must be obtained *before* or *at* the times of the marriages. For suppose the condition to be *precedent*, as the legacy, if at all, was to vest *upon* marriage, if the consent be not obtained at *that period*, an approbation *afterwards* cannot be effectual to vest the legacy, since the testator has declared that the period for vesting is *marriage;* provided the previous assent of his executors or trustees was procured. So also, if the condition be *subsequent*, with a *limitation over* of the legacy upon a breach of it. Because a consent *after* marriage can never have the effect of *devesting* an interest become vested in other persons, *upon* a marriage without consent. For these reasons Lord *Hardwicke* acknowledged, in *Reynish* v. *Martin*,(*e*) that, as the testator's daughter married without the consent of the trustees, their *subsequent* approbation was immaterial, "because (as he observed) no subsequent approbation could amount to a performance of the condition, nor dispense with a breach of it."

In *Malcolm* v. *O'Callaghan*,(*f*) Mr. *Stopford* bequeathed to his daughter *Christian*, 2000*l.* payable on the day of her marriage, provided it took place with the consent *and approbation* of his two executors, or the survivor of them, his executors or administrators, with a limitation over of the legacy to another daughter, *Elizabeth*, if *Christian* married without such consent. The testator added a codicil, by which he limited over the legacy if *Christian* died under the age of twenty-five, or married without such consent as aforesaid; but there was no direction for payment of the money to her *at* that age. *Christian* married without the consent of the executors, who *approved* of it *afterwards*, and became trustees in her marriage settlement. She attained the age of twenty-five. And Sir *Thomas Plumer*, then V. C. determined the following points: 1. That marriage with consent was a condition *precedent;* and therefore necessary to be performed before the legacy became payable. 2. That a consent subsequent to the marriage did not satisfy the words of the will. And, lastly, that marriage without consent being one of the two events upon which the limitation over was to take place, and had

(*e*) 3 Atk. 331. and see Lord *Eldon's* observations in *Clarke* v. *Parker*, 19 Ves. 21. See also *Long* v. *Ricketts*, 2 Sim. & Stu. 179. (*f*) 2 Mad. 349.

happened, although the other was defeated by *Christian's* attaining twenty-five, yet the executory bequest over was absolute, for *Christian's* attaining that age could impart no right to her in the legacy, since it was not given to her at that period,(*g*) or upon any other event than marriage with consent.

The last case is a determination that the expressions "consent" and "approbation" are to be considered of the same import. And it is not a little surprising, that a decision should be found acknowledging a distinction between them in regard to the present subject.

In *Burleton* v. *Humfrey*,(*h*) the trust of real and personal estates was declared in favour of the testator's daughter, if she married with the consent *and* approbation of his trustee, testified in writing; but if she married without such consent *or* approbation, or died unmarried, the property was devised over. The daughter married soon after the testator's death, not having previously made any application to the trustee for his consent. He, however, about *eleven* months afterwards, gave his *approbation* in writing, expressing his *belief* at the same time that he should have consented before the marriage, if he had been applied to for the purpose. Lord *Hardwicke* determined, with respect to the personal fund, that the condition was performed by the *subsequent approbation* of the trustee.

In the above case, Lord *Hardwicke* endeavored to distinguish between the sense of the words "consent" and "approbation;" and he held, after a severe struggle, that although the terms of the condition, upon which the bequest was made, joined the words "consent" and "approbation" by the copulative "and," whence it might be supposed that each word might have been used in the same sense, yet as the limitation over was in the disjunctive, *i. e.* upon marriage without consent *or* approbation of the trustees, his Lordship said he *would* adopt the latter clause instead of the former. It can be scarcely doubted, that his Lordship's decision was contrary to the intention of the testator; for it is clear, from the terms of the devise, that he used the words "consent" *and* "approbation" in the same sense. The marriage of the daughter was the event upon which the devise was made to her. And that it might not be an imprudent one, the testator directed it to be had with the consent *and* approbation of his trustee. That consent and approbation, in order to answer the end in view, must necessarily have been intended by the testator to *precede* the marriage; and Lord *Hardwicke's* criticism on the clause limiting over the devise, seems to have had no other effect than to impute to the testator an intention which never entered into his mind. Compassion for the daughter appears to have influenced his Lordship, and to have warped his better judgment, against which he effectually struggled in making his decree. A decree which authorizes this unreasonable proposition, that if consent or approbation, *after* the marriage had been solemnized eleven months, be sufficient, it must equally be so at any time during the life of the trustee. During all which time, the question whether the marriage was solemnized in conformity with the condition would necessarily continue in uncertainty.(*i*)

(*g*) A circumstance distinguishing the present case from that of *Randal* v. *Payne*, stated *ante*, p. 519. (*h*) Ambl. 256. (*i*) See 19 Ves. 21.

Having shown at what period consent to the marriage ought to be given, we shall proceed to consider—

(A. 2.)—From *what persons* the required assent ought to be obtained.

The confidence reposed in individuals by testators, whether relatives or strangers, to decide upon the propriety of the marriages of their children, is a *personal* trust,(*k*) and must therefore be strictly pursued in the performance. It resembles leasing powers and powers of sale.(*l*) Hence, if the consent of two or more persons be required to the marriage of a legatee, the assent of all of them (if living) must, in general, be obtained, unless the testator have expressly declared the approbation of the majority to be sufficient. In *Clarke* v. *Parker*,(*m*) Lord *Eldon* said, "there is no case in which it has been holden, that the consent of *three* trustees being required, that consent, which, if there were only *two*, would have been quite sufficient, would do; the *third* not having been at all consulted. There was a *discretion* in the third, as well as in the others; and there is no authority, that, if the consent of *three* be required, a marriage with consent of *two* only is that which the will has prescribed."

Contrary to this, Mr. *Atkyns*, in his report of Lord Chief Baron *Comyn's* judgment in the case of *Harvey* v. *Aston*,(*n*) imputes to him a *dictum*, that the "consent of the major part of the trustees" is sufficient. But in *Clarke* v. *Parker*, Lord *Eldon* expressed his belief that no such *dictum* ever fell from the Chief Baron;(*o*) since, in his reports,(*p*) (his own publication of his argument upon the advice given by him to Lord *Hardwicke*,) as also in a manuscript note which Lord *Eldon* had seen, no such passage was to be found.

There is however, a peculiarity belonging to those conditions, when legacies are the subjects, which makes the rules of the Common law inapplicable to them in every instance. This anomaly is produced from the adoption of the Civil law in the construction of personal bequests to a certain extent; according to which, where the condition is precedent, it is considered to be performed within the meaning of the testator, if executed *cy pres* when the whole cannot be literally fulfilled from unavoidable circumstances.(*q*) The principle is the presumption of the testator not requiring the performance of impossibilities, and that his intention will be substantially carried into effect, by permitting it to be executed so far as it can be done. Whereas, by the Common law, as before shown, (*r*) if a precedent condition cannot be literally performed, no matter from what cause, the interest, to arise upon the performance only, will never vest. The sole questions asked by that law, are, Does the devisee answer the description of the devise? Has he fulfilled all its conditions? It does not speculate upon the intention. Hence, so far as the Civil law is followed in the construction of personal bequests, the rule of the Common law is superseded; consequently, precedent conditions, requiring marriages with consent if *substan-*

(*k*) 2 Dow. Parl. Ca. 89.
(*l*) See 3 East, 410. and "Law of Husband and Wife," 1 vol. p. 116.
(*m*) 19 Ves. 17. (*n*) 1 Atk. 375. (*o*) 19 Ves. 15. 24.
(*p*) Com. 726. (*q*) Swinb. pt. 4 sect. 8. 4 Bro. C. C. 328. (*r*) *Ante*, p. 505.

tially complied with, when they cannot be executed according to the letter, will be considered as sufficiently performed to entitle the lagatee to the legacy. It follows, from these observations—

That, if a precedent condition require the consent of *three* trustees to the marriage of the legatee, and one of them *die*; the approbation of the survivors previously to the marriage will be a sufficient compliance with the condition. For, although the testator must have supposed that all his trustees would be living at the time of the legatee's marriage, or he would not have required their joint consent, yet doubtless he could not mean, that by the accident of the death of one of them, his bounty, or, it may be, his obligation as a parent, should be disappointed. It may be reasonably presumed, that if the possibility of one of the trustees dying before it was necessary to consult him on the marriage, had occurred to the testator, he would have expressly empowered the survivors to consent or disapprove of it. And since a prudent connection was the essence of the condition, and the object was attainable in securing it by the previous consent of the two trustees, the case seems to fall under the exception in the civil law to a strict performance of the condition; *viz.* when a testator appears to have more regard to the *end*, than to the *means* prescribed for its attainment.(*s*)

We must, however, be careful to distinguish between conditions *precedent* and subsequent. For, when the condition is *subsequent*, and marriage without the joint consent of two or more trustees or executors is made the *contingency* upon which a legacy is to be *devested*, and to go over to another person, then, if, by the death of one or all of them, it is impossible to perform the condition *literally*, the legatee will be excused from performance altogether, upon the principle before stated,(*t*) that subsequent conditions to devest estates are construed with great strictness. Consequently, if the terms of it cannot be performed, in each and every particular, the whole condition becomes void and the interest of the legatee absolute. The following are authorities upon this subject:

In *Peyton* v. *Bury*,(*u*) the testator gave his residuary personal estate to *Jane Styles*, provided she married with the consent of his two executors; but if she married without it, he gave the residue to *A. B.* One of the executors died, and *Jane* afterwards married without the consent of the survivor, upon which *A. B.* claimed the property. But the *Master of the Rolls*, after declaring his opinion that the condition was subsequent, upon the presumed intent of the testator not to keep his *residuary* estate in contingency during an indefinite period, which might have been for twenty or thirty years if the condition were *precedent*, determined that *Jane* took a vested interest immediately upon the death of the testator, defeasible upon her marriage without the *joint* consent of the executors; a condition, which having become impossible by the death of one of them, her qualified interest became absolute. His Honour therefore dismissed the claim of *A. B.*

In the next case, *all* the executors died before the marriage of the legatee, and the decision was similar to the last authority.

(*s*) Swinb. pt. 4. sect. 7. art. 4. and see 19 Ves. 16. (*t*) *Ante*, p. 514. 523.
(*u*) 2 P. Will. 626. and see *Jones* v. *Suffolk*, 1 Bro. C. C. 528. ed. by Belt. also *Knight* v. *Cameron*, 14 Ves. 389.

In *Graydon* v. *Hicks*,(*x*) Mr. *Graydon* bequeathed to his only daughter *Mary*, 1000*l.* to be paid at twenty-one, or on the day of marriage, which should first happen, provided she married with the consent of his executors (three in number); but if she died before the money became payable on the aforesaid conditions, he gave the legacy to *B.* and *C.* *Mary* married under twenty-one, but all the executors were then dead. *B.* and *C.* claimed the 1000*l.* under the limitation over to them upon the marriage of *Mary* under twenty-one, without consent. But Lord *Hardwicke* decided against the claim, upon the principle, that the condition being subsequent, *viz.* to devest the legacy in the event of marriage without consent before twenty-one, as the act of God had made the performance impossible, the interest of *Mary* became absolute.

So in *Aislabie* v. *Rice*,(*y*) determined by the Court of *Common Pleas* upon a case out of *Chancery*, Mr. *Hatton* devised his estates and mansion house with various articles in and about the premises, after the death of his wife, to *Hannah Lilly* for life, in case she continued unmarried, remainder after her decease to such persons as she should appoint by deed or will, with remainder, in default of appointment, to *Alice* and *Mary Lilly* absolutely in equal shares. But if *Hannah* married during the life of his wife, with her consent and approbation, or after her death with the consent and approbation of *James Turney* and *Thomas Lilly*, or of the survivor, in either case *Hannah* was to enjoy the property, "in the same manner as she could have done if she had continued single." *Hannah* married, but not until *James Turney* and *Thomas Lilly*, and the testator's widow, were dead, whose consent therefore she was prevented from obtaining; nevertheless the question was, whether her estate for life did not determine by her marriage without that consent? And the Judges returned the following certificate; "We are of opinion that the condition was *subsequent;* and that, as the compliance with it was, by the deaths of the testator's widow and *James Turney* and *Thomas Lilly* before the marriage of *Hannah*, become impossible, by the act of God, her estate for life is become absolute; also, that she may now execute the power of appointment in the manner and form directed by the will."

And where an executor sole or joint renounces the executorship or refuses to act in the office to which the authority to assent is annexed, and the legatee whose interest is to be devested, and to go over upon marriage without consent of the renouncing or non-acting executor, marries without obtaining it, the renunciation or refusal to act of the executor will operate as a dispensation with the condition, and absolve the legatee from attempting to perform it *in toto*, or in part, as the case may happen.

In the case of *Worthington* v. *Evans*,(*z*) *Thomas Worthington*, the father, by his will made in November 1805, after giving 3000*l.* to be divided by his executors equally among all the children of his three daughters, gave to his executors, *David Evans* and *Edward Heyward*, their executors, administrators, and assigns, his household

(*x*) 2 Atk. 16. 18.
(*y*) 3 Mad. 256. and see *Grant* v. *Dyer*, 2 Dow. Parl. Ca. 73. *S. P.*
(*z*) 1 Sim. & Stu. 165.

goods and other personal estate therein mentioned, and also all the residue of his personal estate after payment of his debts, upon trust, for the use and benefit of his son (the plaintiff,) to be paid and transferred to him as soon as conveniently might be after his marriage, with the interest and produce to accrue and arise in the mean time, upon condition, nevertheless, that such marriage should be with the consent of his, the testator's, trustees, or the survivor of them, first had and obtained in writing under his or their hand or hands; and after directing his trustees to cause an inventory and appraisement to be made, and authorizing them to permit the plaintiff to continue in possession of a certain farm till his marriage, but if the plaintiff should marry without the consent of the trustees, or the survivor of them, first had and obtained in writing as before mentioned, or in case he should, with or without their consent, marry *J. P.* or any of the daughters of *T. P.* then that the plaintiff should not be entitled to any part of the household goods, property or effects before bequeathed for his benefit; and he directed the trustees or the survivor of them, to pay the sum arising from the appraisement, and all the residue of his personal property among all the children of his three daughters, in equal shares; and appointed *David Evans* and *Edward Heyward* executors of his will. The testator died in 1806; *David Evans* alone proved the will, and alone acted in the execution of the trusts; the other executor and trustee, Mr. *Heyward, refused to act* in any manner in the trusts of the will. Soon after the testator's death the plaintiff formed an attachment to a lady, whom he afterwards married, and who was not of the family prohibited by the testator. This attachment was formed and a treaty of marriage entered into with the approbation of Mr. *Evans,* the acting executor and trustee. A short time before the marriage, the plaintiff applied for the consent both of *Evans* and *Heyward*, and the solicitor of the former prepared an instrument in the form of a deed poll, to be executed by both the executors, reciting the clause in the will and the intended marriage, and expressing a formal consent to it. This instrument was duly executed by Mr. *Evans;* but Mr. *Heyward*, though he expressed his perfect consent to the marriage, declined executing the instrument, lest he should thereby be considered as taking upon himself the trusts of the will. On the day preceding the one which was fixed for the marriage, the plaintiff wrote the following letter to Mr. *Evans:* "Dear sir,—Fearful it should have slipped your memory, I have taken the liberty of reminding you, that it is still my intention to be married to-morrow, when I expect to see you here, and call on Mr. *Heyward* on your road, as he has promised me, at as early an hour as you may think proper." On the same day, Mr. *Evans* wrote in reply, saying, among other things, "I will, however, be as early to-morrow morning as I possibly can at Mr. *Heyward's*, and bring with me the proper consent, done right, to your house, which will be some time doing." "*N. B.* I should have sent your servant home sooner, but I waited for Mr. *Thomas* who was from home. But you know you have my consent to marry your cousin, *Sarah Worthington.*" Mr. *Thomas* was the solicitor employed by Mr. *Evans* to prepare the instrument. Early in the morning of the day on which these letters were written, Mr. *Evans*

called on Mr. *Heyward*, and produced to him the instrument in question, which *Heyward* read, but which he declined to sign, on the ground that it might be considered as done in execution of the trusts of the will, in which he refused to act. Mr. *Evans* then signed the instrument himself, and proceeded to the house of the plaintiff, where he found that the marriage had taken place in the morning, some hours before his arrival, and before the time when he signed the instrument. It was urged on the part of the plaintiff that the consent given was sufficient, that the power of consent was entirely annexed to the office. Sir *J. Leach*, V. C. said, "I am prepared to hold, according to the intimation of Lord *Eldon*'s opinion, in *Clarke* v. *Parker*, that the authority to consent is here annexed to the office of trustee; and like other authorities annexed to that office, vested in the single trustee who acted. The letter written by the acting trustee the day before the marriage, must be considered as a sufficient consent in writing. And if there had not been such a letter, inasmuch as the formal consent in writing would have been executed by him but for the accidental delay occasioned by the other trustee, and not from any change of purpose, the Court would have considered his consent to have been substantially given, according to the will; because he had expressed his full approbation of the marriage, and only did not sign it for a reason personal to himself." And for these reasons his Honour decreed in favour of the plaintiff.

But where the authority to consent *is not annexed to the office*, it should seem that the renunciation of the office of executor or trustee will not preclude the necessity of obtaining the consent of such renouncing executor or trustee. This, it is presumed, may be collected from the case of *Graydon* v. *Graydon*,(*a*) a branch of the case of *Graydon* v. *Hicks*,(*b*) before in part stated. The case is ill reported, and, at first sight, would seem to authorize the conclusion, that the forfeiture of the daughter's legacy under her mother's will was occasioned by her marriage without the consent of the *administrator with the will annexed*.

In that case, Mrs. *Graydon* bequeathed all her wearing apparel, &c. to her daughter *Mary*; provided, that if her daughter married before the age of twenty-one, without the consent and approbation of her executor, under his hand, (*if living*) she should not be entitled to the legacy, but it should go over to other persons; and appointed her *son* sole executor. The son formally renounced the executorship, and administration with the will annexed was granted to a stranger. *Mary* married under twenty-one, without the consent either of her brother or the administrator. And the question was, whether by the marriage of *Mary* under those circumstances, she had not incurred a forfeiture of the legacy? And Lord *Hardwicke* determined in the affirmative; but his reasons are very shortly and obscurely stated.

That Lord *Hardwicke* considered an administrator with the will annexed, a person equally in the confidence of the testatrix with the executor especially appointed by her, to controul the marriage of her daughter, can scarcely be credited.(*c*) That she had no such person in view at the date of her will, clearly appears from the terms

(*a*) 2 Atk. 16. 19. (*b*) *Ante*, p. 536. (*c*) See 2 Dow Parl. Ca. 89.

of the bequest. The only consent required to the marriage was that of the testatrix's executor (her son,) *if living*. While in existence, he alone was to exercise the privilege in preference to every other person. He was living; a circumstance, therefore, necessarily excluding the administrator with the will annexed from any such power. And, if he had been dead, the cases before stated prove, that the daughter was not under any obligation to solicit the administrator's consent to her marriage. So that, whether the son was living or dead at the time of his sister's marriage, the right of the administrator to be consulted on the subject of that transaction could not exist. Hence, Lord *Hardwicke's* decision may with reason be attributed to the daughter's marrying without the consent of her brother. And that she did so, may be inferred from his observation, that "the power of assent was not annexed to the office of executor, but was independent of the rest of his duty as executor." Whence it follows, that renunciation of the office did not determine the son's power of assenting to his sister's marriage; a power, which could not be enjoyed at the same time, both by him and the administrator. For these reasons it is apprehended, that the forfeiture, declared by Lord *Hardwicke*, was in consequence of the legatee's marriage, without the consent of her brother, and not of the administrator with the will annexed.

Having considered the persons, whose consent to the marriages of legatees is necessary. The next consideration will be,

(A. 3.)—What will be a sufficient consent.

The exercise of the discretionary power of assenting to the marriages of legatees, is under the eye and controul of a court of equity. It will not suffer that power to be abused, but will examine into the conduct and motives of the persons entrusted with that discretion, in order to ascertain, whether a refusal to consent proceeded from vicious, corrupt, or unreasonable causes: a dangerous assumption of power, it is true, but which the Court has nevertheless always exercised.(*d*) It is a consequence of this jurisdiction, that, if an executor or trustee, whose assent is made a necessary preliminary to the marriage of a legatee, refuse to execute his power, the Court will direct one of its Masters to inquire into the intended marriage, and determine upon its propriety; with directions to receive proposals for a settlement upon the legatee, and the issue of the marriage, in the event of the marriage being found suitable.(*e*)

A Court of equity, in sitting in judgment upon the conduct of individuals entrusted with the power of assenting to, or dissenting from, the marriages of legatees (on the due exercise of which, the rights of those legatees are either to vest or be forfeited,) substitutes itself in the place of the testator. It acts upon what it presumes to have been his intention in imposing the condition, and with reference to the persons who are actors in the performance. Hence arise the rules and distinctions established by the cases upon this subject. And—

FIRST, although consent, to the marriage of a legatee, may not be so given, as regularly to fall within what may be rationally con-

(*d*) 10 Ves. 245. 19 Ves. 18. (*e*) *Goldsmid* v. *Goldsmid*, 19 Ves. 368. 372.

sidered to have been the intention of the testator, yet if the legatee act upon such assent, and marry in the persuasion that consent has been properly obtained, the condtiion will be holden to have been sufficiently performed: and for the following reasons. The irregularity was not imputable to the legatee, but to the mistake of the person, whose consent was to be obtained. The legatee intended to act in obedience to the condition; but was misled by the individual entrusted with the power to assent. Under such circumstances, the Court considers that the condition being so performed, is a fulfilment of the intention of the testator who imposed it.

Suppose then the condition to require marriage by the legatee with the consent of *B.* The testator must be understood to mean that *B.* should be consulted during the addresses which preceded the marriage.(*f*) Yet, if the legatee be of age, and *B.* give a *general* consent for the legatee's marrying any person whom the latter shall choose, who, upon the presumed regularity of such licence, marries without the knowledge of *B.*; the marriage will be considered to have been solemnized within the true intent and meaning of the condition.

Thus in *Mercer* v. *Hall*,(*g*) a legacy was given in trust for the plaintiff "upon her marriage with the previous consent in writing of her mother, if living, but if *then* dead, with such consent of her father;" and if she married without such consent, during the life of her father and mother, or either of them, the legacy was to be settled by them or the survivor upon her and her children. The plaintiff married after the decease of her parents, who previously to their deaths signed a paper-writing, by which they gave "free leave and consent to their daughter to marry whomsoever she choosed;" and empowered her to settle and dispose of the legacy "according to her own inclination." The question was, whether the daughter's marriage was sanctioned by such consent as the will required? And Lord *Alvanley*, M. R. said, he was clearly of opinion in favour of the daughter; 1st, because consent was only necessary during the lives of the father and mother, or the life of the survivor; and 2dly, because the testatrix's intention was sufficiently answered by the *general* consent, notwithstanding she meant that there should be *a* consent to the *particular* marriage; for, if the material part of the condition were complied with, the bequest was good.

Similar in principle to the last case was that of *Pollock* v. *Croft*.(*h*) There Mr. *Fielding* bequeathed the interest of his personal estate to his mother for life. After her death, he gave the capital to trustees, to pay the interest to his sister *Mary* so long as she continued single; and if she married with the consent of her mother in writing, or subsequent to the mother's death, with the consent of Mr. *Croft*, then the trustees were to convey to her his residuary estate. But if she died without having been married with such consent as aforesaid, or should marry without the consent before made requisite, he gave the property to his brother. *Mary* did not marry during the life of her mother; after whose death, and after attaining the age of twenty-one, Mr. *Croft* verbally gave her a *general*

(*f*) 4 Bro. C. C. 328. (*g*) Ibid. 327. (*h*) 1 Meriv. 181.

consent to marry *whomsoever she pleased.* Subsequently to this general license, *Mary* married without the knowledge of Mr. *Croft;* a marriage, which he afterwards approved of. And the same question arose, as in the preceding case, *viz.* whether the marriage was accompanied with the consent required by the will. And Sir *W. Grant* decided in the affirmative.

SECOND. *Absolute* consent once given cannot be retracted upon any consideration, which does not affect the propriety of having granted such consent in the first instance. The reason seems to be, that the parties are considered to have acted upon the license, and it would be doing violence to their feelings, as well as to the intention of the testator, to permit the consent to be countermanded for any reason, which did not prove that the assent ought not to have been originally given.

If then executors, guardians, or trustees, approving of the connection, assent to it without qualification, and afterwards dissent before the marriage, because the intended husband will not accede to all the terms of the settlement proposed by them, and the marriage nevertheless takes place; the condition requiring their consent will be considered as well performed; since the motive for retraction had no reference to the suitableness of the connection, in respect of which the consent was given, but to collateral circumstances which might have been, but were not, made conditions upon which the consent should depend.

Under this head, Lord *Eldon*(*i*) classed the case of Lord *Strange* v. *Smith.*(*k*) The question was, whether the plaintiff was to have, *jure uxoris*, an estate for life in real estate; or whether, as the marriage was without consent of the lady's mother, the rents were to be in trust for the separate use of the daughter as directed by the will? The cause turned upon the point, whether, under the circumstances the daughter's marriage was to be considered as solemnized with the previous consent of her mother. It appeared in evidence, as detailed in Lord *Hardwicke's* note of the case,(*l*) that the mother had expressly given her consent; the daughter's affections were entangled, and afterwards the propositions about a settlement, not having been made the subject of any qualification as to the consent given, a new proposition was adopted; and at last the mother positively insisted upon a new term. The husband's father was averse to it, but at length he consented, thinking it for the happiness of the parties; but then the mother of the wife (who seems to have been of a very perverse disposition, the moment the concession was made, said her daughter never should marry into that family. Under those circumstances, Lord *Hardwicke* was of opinion (approved of by Lord *Eldon,*) that, a consent having been given *without any condition,* every thing reasonable agreed to, no fair objection, either of a moral or a pecuniary nature, it was a *fraud* upon the affections of the daughter to *retract* the consent, merely from caprice and perverseness.(*m*)

Merry v. *Ryves*(*n*) is a case, in which the decision is an additional authority upon the present subject.

(*i*) 10 Ves. 242. (*k*) Ambl. 263. (*l*) So stated by Lord *Eldon,* 10 Ves. 242.
(*m*) See *D'Aguilar* v. *Drinkwater,* 2 Ves & Bea. 234. (*n*) 1 Eden, 1.

There Miss *Ryves* was entitled under her father's will to a portion of 1000*l.* charged upon lands, provided she married with the consent of her mother and brother and another person, &c. But if she married without such consent, the money was not to be raised. The plaintiff *Merry* (whose father was a man of property) paid his addresses to the young lady, and he, by letter, requested her brother's consent to the union, stating his belief, that he had won the lady's affections. The brother in answer informed Mr. *Merry*, "that he should not oppose it; that Mr. *Merry's* character and circumstances were extraordinarily good, and that he should leave the management of the settlement to a Mr. *Brucer*, by whose agreement on the settlement he would abide." Articles were accordingly prepared, and executed; and the mother and the other person, whose consents were required, assented; but before the marriage took place, the brother and Mr. *Merry quarrelled*, upon which the former *retracted* his consent, and forbad the marriage, but without effect. The question was, whether it was competent for the brother to withdraw his consent from such a motive? and Lord *Northington* determined in the negative.

But that consent to a marriage is incapable of being withdrawn for any reason, is a proposition which cannot be maintained; since it might be the duty of the persons, who gave the consent, to countermand it. As a general principle, therefore, it would be very dangerous to hold; if, at a particular time, a person in *loco parentis*, as guardian, upon a conscientious sense of duty, *think* himself required to consent, which he accordingly gives, but previously to the marriage, is properly informed of circumstances, which *ought* to have operated *at first*, to make him withhold his consent, that such person shall not afterwards alter his mind.(*o*)

Third. Consent to marriage may be given *conditionally*, and the vesting or forfeiture of the legacy will depend upon the performance, or non-performance of the condition.

Thus in *Dashwood* v. Lord *Bulkeley*,(*p*) the testatrix directed her trustees to apply the interest of a sum of money, for the separate use of her grand-daughter *Elizabeth Callendar* for life, when she attained twenty-one or married; but with a proviso for reduction of the legacy to 400*l.* a year for life, if she married during or after minority, without the consent in writing of her executors and trustees, Lord *Bulkeley*, Sir *M. W. Ridley*, *George Bogg*, and Mr. *Keate*. The residue of the interest was given over. After the death of the testatrix, and while *Elizabeth* was under age, Mr. *Dashwood* paid his addresses to her, and proposed, through his solicitor, to Mr. *Bogg*, to settle 6000*l.* upon the marriage; a proposal, which Mr. *Bogg* communicated by letter to his co-trustees. In answer to which, Lord *Bulkeley* stated in effect, that with reference to rank, character, and connection, the proposal was perfectly agreeable; at the same time referring to the settlement, which he requested Mr. *Bogg* to see was a proper one. The other trustees gave the like written consent to the marriage, upon condition that the settlement was made. The settlement, though prepared, was not executed in con-

(*o*) 10 Ves. 242.
(*p*) Ibid. 230. and see the next chapter towards the conclusion of sect. 1.

sequence of the death of Mr. *Dashwood's* father; after which event, Mr. *Dashwood refused* to make or execute any settlement; and then the executors *retracted* their consent by a written notice. The marriage, nevertheless, was afterwards solemnized; and Lord *Eldon* confirmed Lord *Rosslyn's* decree (which declared that *Elizabeth* was only entitled to the 400*l.* a year for life, in consequence of her marriage without the consent of the executors, (upon the principle, that, when Mr. *Dashwood* distinctly refused to execute any settlement, as he had proposed to do, and which formed one of the grounds for the consenting of the trustees to the connection, it was not unreasonable in them to insist upon a settlement, and to withdraw their consent upon a refusal.

Having given an example of conditional assent when the condition was effectual, we shall next produce an instance, where the terms of such an assent were held to have been performed, and therefore the consent absolute.

In *D'Aguilar* v. *Drinkwater*,(*q*) 20,000*l.* were vested by the testator in his two sons and a Mr. *Haywood* (his trustees and executors,) to pay to his daughter *Eliza*; the interest from the time when she attained twenty-one, until she married; and if she married, whether under that age or afterwards, *without* the written consent of his trustees, or of those then living, the principal and interest were to be settled to her separate use, and upon her issue; but if she married *with* such consent, 10,000*l.* of the fund were to be paid to her, and the remainder settled to her separate use and appointment. *Eliza* attained twenty-one, and married Captain *D'Aguilar* under the following circumstances. Previous to the marriage of *Eliza*, she resided with *Haywood*, through whom she informed her brothers of the captain's proposals. *Haywood* invited the captain to his house, and for some time afterwards, his addresses were permitted without objection. Differences, however, arose upon the subject of settlement, and the captain's quitting the army; and the brother's declared they would never consent to the connection. But, in consideration of their sister's feelings and attachment, they were induced to alter their resolution, and to promise to give a written consent, which they stated they had done in a letter to *Haywood*. The fact was so, and *Haywood*, in answer, declared, that "he would not stand in the way of any arrangement his co-trustees might think proper to make with regard to their sister's concerns;" but alluded to the necessity of a proper settlement being made, stating, nevertheless, "that he mentioned the circumstance, not with a view of raising objections, or meaning to differ from his co-trustees." After this, the brothers gave an unqualified assent, but with reluctance, mentioning it to be given in consequence of a promise extorted against their judgment; and from a sense of duty upon an apprehension of their sister's life being in danger. The consent of the brothers having been thus absolutely obtained, the only question was, whether *Haywood* had consented. And Sir *W. Grant*, M. R. determined in the affirmative. His Honour considered *Haywood's* assent to have been *conditional;* and his letter, when simplified, to amount to no

(*q*) 2 Ves. & Bea. 225.

more than this, "if you (my co-trustees) consent, I will." And that, as they did consent, his (*Haywood's*) consent was virtually included.

An observation must not be omitted, that, if the consent to a marriage be upon condition of a proper settlement being executed in pursuance of proposals for the purpose, but before the settlement is approved and executed, the parties marry; yet, if the settlement be afterwards executed, the condition will be well performed; and, as it seems, upon this principle. The execution of the instrument has relation to the period when the treaty commenced, so that, by this fiction, the settlement being completed before the marriage, there was a good previous assent to the celebration. Upon this subject, Lord *Eldon* expressed himself, in reference to the settlement in *Dashwood* v. Lord *Bulkeley*: "Strictly speaking, (if the authorities did not forbid the construction,) the *natural* interpretation would be, that, if the settlement is made, the consent shall follow; and the mere offer will not do; but in many of the cases, though upon the treaty the intention seemed to be that the settlement should be *before* marriage, yet a settlement *after* marriage has been held sufficient to satisfy such a conditional offer."(*r*)

Fourth. When consent is judicially considered, as having been obtained, it is of no consequence whether the persons, upon whom the obligation is imposed to acquire it, be mistaken in the circumstance, and suppose that it has not been given.

Accordingly it was contended in the case of *D'Aguilar* v. *Drinkwater* last stated, that a letter written by Captain *D'Aguilar* shortly before his marriage, showed he did not conceive the consent of Mr. *Haywood* had been obtained, a circumstance of no little importance to demonstrate, that Mr. *Haywood's* assent had been withholden. But Sir *W. Grant* denied this conclusion, and thus expressed himself: "Whether Captain *D'Aguilar* had never seen Mr. *Haywood's* letter, or did not construe it as I do, I know not. The question is, *not* as to what he *thought* or *believed*, but as to *what actually existed*. In *Campbell* v. Lord *Netterville*, shortly stated in 2 Ves.,(*s*) it appears from the cases in the *House of Lords*, that the parties were at the time of the first marriage quite ignorant of the circumstances, which were held to amount to a constructive consent on the part of the father; so much so, that instead of insisting on it as a marriage by consent, they had refused to answer any of the interrogatories in the bill, as tending to subject them to a forfeiture of the wife's fortune. Advantage was taken of that silence in the appellant's case, where it is said that it is inconsistent with the answer and marriage articles, and the subsequent marriage, &c. It is accounted for by the respondent in this manner, that they were *not then* so fully informed, as they were afterwards from the course of the evidence, of the several steps taken before-hand by *Burton* to *forward* the marriage, as by the cross-examination and other evidence appeared."

Fifth. *Express* consent to the marriages of legatees is not always necessary. It may be implied from the improper conduct of the individuals whose assent is required by the terms of the conditions.

(*r*) 10 Ves. 244. (*s*) p. 534. stated *infra*.

It cannot be supposed that a testator, in requiring the consent of relatives or strangers to the marriages of the objects of his bounty, meant that they should abuse the confidence reposed in them and convert it into an instrument of oppression, but as a prudential restraint for the comfort and happiness of the legatees. Upon this principle it is, that courts of equity, in exercising their power and authority upon the present subject, *imply* the necessary consent when it is withholden by the persons entrusted to give or deny it, after they have known and acquiesced in, or otherwise promoted, addresses to the individuals, the propriety of whose marriages is entrusted to their care and vigilance.

Hence if a trustee, &c. with the knowledge that the lady, whose marriage is to be with his consent, is receiving addresses, stand by and intimate no disapprobation,(*t*) or if he introduce a person to her who embraces the opportunity, and, with the knowledge of the trustee, continues to address her with a view to marriage, without the latter endeavouring to prevent it, in either case his consent to her union will be implied. For it would be singularly unjust, and doubtless inconsistent with the testator's intention in imposing the condition, to permit the trustee, after a mutual attachment had been suffered to mature under his sanction, to withhold his approbation to the marriage, and to do violence to the feelings and affections of the parties. The maxim therefore, *qui tacit satis loquitur*, is respected in those instances and *constructive* consents have been looked upon as entitled to as much regard as if conveyed in *express* terms.

Thus in *Campbell* v. Lord *Netterville*,(*u*) Mr. *Campbell* bequeathed to his grand-daughter *Catherine Burton* 6000*l.* payable at her marriage, provided it was concluded with consent of her father *Samuel;* but if she died unmarried, or married without such consent, the money was limited over. *Samuel* encouraged proposals by Lord *Netterville*, representing his daughter's fortune at 15,000*l.* but afterwards drew back because he could not make good his part of the proposals. The parties married privately, so that there was no express consent of the father obtained; to remedy which and prevent the forfeiture, articles were framed, making a proper settlement, and a second marriage took place *in facie ecclesiæ*. This was admitted, and the probable reason of the father drawing back was, because the bank in which he was engaged was in a precarious state. It was held by the House of Lords, that the marriage having been *encouraged* between the parents till, from the circumstances of one of them, he could not give the whole 15,000*l.* the implied assent which had been given, should not be determined or prejudiced by that accident.

Under this head, Lord *Hardwicke* in *Strange* v. *Smith*,(*x*) placed the case of *Daley* v. Sir *Edward Desbouverie*, although Mr. *Atkyns* in his report of it,(*y*) makes his Lordship to decide the case upon a letter, as amounting to a conclusive consent.

In that case, the consent to the marriage of Lady *Burke* was confided to three trustees, or the majority or survivors of them. Mr. *Daley*, after continuing his addresses to that lady for five months

(*t*) 2 Vern. 580. 19 Ves. 13.
(*u*) Cited in 2 Ves. sen. 534. 10 Ves. 243.
(*x*) Ambl. 264.
(*y*) 2 Atk. 261.

(but whether with the knowledge of any of the trustees does not appear,) informed Sir *Edward Desbouverie* (one of the trustees) of his intentions to marry Lady *Burke*, and made proposals for a settlement, which Sir *Edward* took down in writing and communicated them to his co-trustees, who were unanimous in their being inadmissible, as the interest of the lady's fortune was proposed to be received by Mr. *Daley's* father for life; but they agreed upon counter-proposals for settling upon the marriage the whole of the lady's fortune, allowing her and her husband a sufficient yearly sum for their support. They immediately transmitted Mr. *Daley's* proposals to a Mr. *Taylor*, in the employ of Lady *Burke's* family, with a letter (that was written only a few days before the marriage of the parties,) in which they stated the inclination of that lady to marry Mr. *Daley;* their being strangers to Mr. *Daley* the father; requesting Mr. *Taylor* to ascertain the father's ability to make the settlement proposed by his son; and recommending, if he were desirous of entering into treaty, that the counsel of the family should be consulted. The trustees then mentioned that Lady *Burke* might marry better, and introduced the passage which Lord *Hardwicke* is reported to have considered an absolute consent: "Yet if Mr. *Daley's* father will make the settlement proposed (by them the trustees,) we believe the young folks are too far engaged for us to attempt to break off the match, and therefore we shall be obliged to consent to it." Up to this period there appears to be nothing like an unconditional assent. The trustees, in discharge of their duty, were endeavouring to procure what they considered a proper settlement upon Lady *Burke*, and their consent to the marriage was expressly limited to a compliance with their proposals. In this there was nothing either vicious or fraudulent. There were further negotiations about the settlement, which ended in nothing, and the parties married without any other consent by the trustees than before detailed. Yet Lord *Hardwicke* determined, that the trustees had given a sufficient assent by the letter before stated.

That the last decision must be considered anomalous, appears from Lord *Eldon's* judicious criticisms upon it: "In Lord *Strange* v. *Smith*, Lord *Hardwicke* declares that the case of *Daley* v. *Desbouverie* went upon *fraud*, *i. e.* upon the inclinations, affections, and passions of the young people. There is another way of putting it, that the execution by two (for the consent of the majority was sufficient there) was a consent; but Lord *Hardwicke* in another case says, that upon this subject of marriage the Court will construe otherwise than upon other subjects; and that must be the ground upon which he held the execution to be a consent; otherwise, I think, no one *would say it was a consent;* and accordingly, in Lord *Strange* v. *Smith*, his Lordship puts it not upon that ground, but upon *fraud*. If it is to be maintained upon that ground of fraud on the young people, there must have been circumstances we are not quite aware of; for that letter was not more than five or six days before the marriage. And if there was time for that letter to come to the knowledge of the parties, it is difficult to say their affections were entangled, &c. in so short a period. Taking, however, Lord *Hardwicke* to have decided upon the letter, the conclusion is, that he determined

upon *his own view* of its meaning; and upon such a point of construction, one Judge may differ from another."(*z*)

If, as we have seen, consent to marriage will be implied, upon the mere acquiescence of trustees, &c. in the courtship prior to that event; *a fortiori*, where a trustee, &c. has *an interest* in the property, upon the legatee's marrying without his assent, and he encourages the marriage and yet *affects* to withhold his consent, that consent will be implied; for his conduct in not having expressly given it under those circumstances, is not only fraudulent but vicious, and in violation of the confidence reposed in him by the testator. The following case falls within this principle:

In *Mesgrett* v. *Mesgrett*,(*a*) Mrs. *Tanden* bequeathed to her only child *Maria*, a pearl necklace and jewels; but, if she married under twenty-one, without the consent of the testatrix's executors, or the greater number of them, the legacy was to go to the *children* of the testatrix's sister (wife of the defendant *Mesgrett*,) and she appointed *Mesgrett* and two other persons her executors. *Maria* was eleven years old at her mother's death. She lived some time afterwards with *C.*, one of the executors, and was *there* courted by the plaintiff, her husband, the son of *Mesgrett* by a first wife. She afterwards removed to the house of the executor *Mesgrett*, where the marriage was had with his privity, although he now insisted that the legacy was forfeited, and given over to the children of his second wife, the testatrix's sister. The other executors admitted notice of the courtship, which they neither contradicted nor disapproved of, nor removed the young lady, as they might have done: Under these circumstances, the Lord *Keeper* decreed in favour of *Mary*, as it clearly appeared there was at least a *tacit* consent, the will not prescribing the form to be in writing or otherwise. And his Lordship imputed *fraud* to *Mesgrett* in first promoting the marriage, and then *pretending* a forfeiture had been incurred for want of a consent, *in order to procure the legacy for his children by his second wife.*

SIXTH. Consent to the marriage of a legatee will be considered well given, and the condition complied with, if the legatee marry with the *approbation* of the *testator in his life time*, though *in words* the testator has only spoken of a marriage to take place *after his death.* The principle is this:—The proper marriage of the legatee being the essence of the condition, the purpose is answered by a marriage under the eye, and with the consent of the testator. The condition, it is true, is not performed according to the letter, but it is so *in substance*, which is sufficient.

Thus in *Clarke* v. *Berkeley*,(*b*) under a devise upon trust to convey to the testator's daughter, in case she married with the consent of *two* of the trustees and her mother; and if she died before marriage, or married without such consent, to other uses. The daughter having married in her father's life time *with his consent*, Lord *Cowper* decreed a conveyance according to the will; declaring the condition to be dispensed with, the consent of the testator himself having been obtained, which was more to be regarded than the consent

(*z*) 19 Ves. 19 & 12. (*a*) 2 Vern. 580.
(*b*) 2 Vern. 720. 8 Vin. Abr. 154. pl. 10. in marg. *S. C.* and see *Clerke* v. *Lucy*, ibid. pl. 11.

of trustees, to whom he had delegated a power to consent in case of marriage after his decease.

In *Parnell* v. *Lyon*,(c) Sir *W. Grant* proceeded upon the same principle.

In that case, Mr. *Barton* bequeathed all his personal estate in trust for his children equally. The shares of daughters to be paid at their ages of thirty, or sooner, in case they married with the consent of such of his executors as mentioned in the will. But if any of them married without such consent, her share was to be settled to her separate use for life, and at her death the capital was limited over. *Elizabeth* (one of the daughters) married under twenty-one, before the death of her father, and with his consent, as it was alleged; but the fact was not in evidence. Conceiving that by such marriage she was entitled to the immediate payment of her fortune, upon the death of her father, although she was far distant from the age of thirty; the suit was instituted. And Sir *W. Grant* declared, that if, upon inquiry before the Master, the testator's consent should be proved, it was equivalent to a marriage with consent of the executors after his death, and would equally entitle *Elizabeth* to payment of her portion.

A similar decision was made by Sir *John Leach*, V. C. in the case of *Wheeler* v. *Warner*.(d) In that case *Isaac Warner* gave 10,000*l.* stock to his wife *Mary Warner* and his son *Simeon Warner*, upon trust to pay the dividends to his daughter *Sophia Warner*, whilst she remained single, or until she married with the consent of his wife and son, or the survivor; and if she should, after his decease, marry *with* such consent in writing, the trustees, or the survivor, were authorized to advance any part of the stock (not exceeding one-third) to the husband; but if she married *without* such consent, then the testator declared other trusts of the whole fund for the benefit of his daughter and her issue. *Sarah Warner* married *Robert Wheeler*, in her father's life time, and after the testator's death a bill was filed by Mrs. *Wheeler* and her children against the trustees, her husband and others, for an account, and to have the rights of all parties ascertained. The Master, to whom it was referred to inquire whether Mr. and Mrs. *Wheeler's* marriage was had with the consent of the testator, and if not, whether it was subsequently approved by him, or whether he was afterwards reconciled to them, reported, that the marriage took place without the consent of the parents, but that, from a variety of facts, he found that the testator was reconciled, and that a friendly intercourse had subsisted between him and Mr. and Mrs. *Wheeler*, down to the time of his death. The preceding cases of *Parnell* v. *Lyon* and *Clarke* v. *Berkeley* were cited in behalf of the plaintiffs and Mr. *Wheeler*. Sir *John Leach*, V. C. observed, that the authorities cited established the proposition, that a marriage in the life time of the father, with his consent or subsequent approbation, was equivalent to a marriage after his death with the consent of the trustees, and the directions must be given according to the provisions of the will in that event; and decreed, that the husband was entitled to one-third part of 10,000*l.* stock.

A similar determination was made by the same Judge in the re-

(c) 1 Ves. & Bea. 479. (d) 1 Sim. & Stu. 304.

cent case of *Smith* v. *Cawdery*,(*e*) wherein a bequest was made to *Mary Young* on the day of her marriage with any other person than *Henry Twynam*; and if she married him, then over. She married *H. Twynam* in the life time and with the consent of the testator, and she was held entitled to the bequest.

(A. 4.)—Whether conditions requiring consent will be considered fully performed by the first marriage with the required assent.

The intention of testators, in imposing restraints upon the marriages of their children, is to guard the inexperience of youth from surprise and imposition, by the prevention of hasty and inconsiderate engagements. A court of equity, therefore, acting upon the authority of this intention, will limit the general terms of the condition to an assent to one marriage only. If then a legatee once marry with consent, whether during the life of the testator imposing the condition, if with his approbation; or afterwards, with the proper authority; as the condition has been complied with, it becomes extinct; so that a second marriage *without* consent will not prejudice the legatee.

In *Hutcheson* v. *Hammond*,(*f*) *Ann Hutcheson* (by mistake named *Jones*) was entitled to a legacy of 1500*l*. under the testamentary appointment of her step-mother *Frances*, payable after the death of her father. By a codicil, the testatrix declared, that if *Ann* married during the life of her father, without his written consent, the legacy was to go according to his appointment. *Ann* married with the requisite assent; and it became necessary to consider, whether, if she became a *widow* in the life-time of her father, and married *again without* his consent, a forfeiture of the legacy would be incurred. And *Buller*, J. declared in the negative.

In *Crommelin* v. *Crommelin*,(*g*) Lord *Rosslyn* adopted the principle of the preceding case, holding the condition not to be applicable to a daughter, who married, and became a widow during her father's life.

That was a bequest in trust for the testator's natural daughters *Mary*, *Juliana* and *Hannah Barker*, payable at certain ages, or sooner upon their marriages with consent of the testator's trustees, or the survivors; with dispositions of proportions of their shares upon their marrying *without* such consent. *Juliana* being in *India*, married before the death of her father, with the consent of one of the trustees, and with the subsequent approbation of her father; in whose life-time she became a widow, and married again shortly after his death (being still in *India* and ignorant of his will) with the consent of the same trustee. *Juliana* claimed her portion, but her right was disputed upon the ground, that at the time of her *second* marriage with consent of one trustee only, she was an object of the above condition, with which she had not complied. But Lord *Rosslyn* was of a contrary opinion; observing, in the delivery of a very elaborate judgment, that there was nothing in the will to show a *second* marriage to be in the testator's contemplation, and he decided the case upon the principle, that *Juliana* having married (with

(*e*) 2 Sim. & Stu. 358. (*f*) 3 Bro. C. C. 128. 146. (*g*) 3 Ves. 227. see *ante*, p.

the subsequent approbation of the testator,) and being a *widow* at his death, *was not intended* to be subject to the condition.

(A. 5.)—When conditions requiring consent to marriages are to be limited within the periods appointed for their payment.

Conditions of marriage with the consent of parents, *guardians*, &c. are generally limited to the times when the legacies vest or are made payable; so that if there were two periods mentioned in a will, upon either of which a legacy was to vest or be paid, viz. at the legatee's age of twenty-one, or marriage with consent, with a clause of forfeiture upon marriage without consent; a court of equity will construe such clause as having relation to a marriage *under* the specified age. Hence, if the legatee attain that age, compliance with the condition is unnecessary; for it has become extinct in consequence of the legatee's attaining twenty-one.(*h*) This is firmly established by the following authorities:

In *Desbody* v. *Boyville*,(*i*) stock was vested in trustees to apply the dividends for the benefit of the testator's grand-daughter during minority, or until her marriage; with a direction to transfer the fund to her when she attained twenty-one, or should be married with the consent of *A.* and *B.* But in case she married without such consent, the stock was to be settled upon herself and children; and if she left no issue, the stock was limited over. The grand-daughter, not having married during minority, claimed immediate payment of her legacy, in which claim she must have failed; if the transfer was to await the contingency of her marriage with the consent of *A.* and *B.* But Lord *King*, C. was of opinion, that, as the grand-daughter had attained twenty-one, she took a vested absolute interest in the stock; and that, since the testator expressly directed the fund to be transferred to her at that age, *the condition annexed to her marriage must be restrained to a marriage* before twenty-one: for if the stock were transferred to her at that period as the will prescribed, the executors, in the event of her afterwards marrying without the consent of *A.* and *B.* could not upon her death transfer the fund to her children; or, if no issue, to the remainder-man. Whence it was clear, that the testator could not intend there should be any forfeiture, but only in the event of the grand-daughter's marriage without consent under twenty-one. His Lordship, therefore, ordered the stock to be transferred to her.

Lord *Camden* made a similar decision in *Knapp* v. *Noyes*,(*k*) where the testator gave to each of his five children 1500*l.* payable to daughters at the times of their marriages *with* the consent of his executors, or of the survivor; but if any of them married *without* such consent, she was only to receive 500*l.* part of that sum, and the residue was limited over. *Mary*, one of the daughters, never married, and died after attaining twenty-one. The will contained a clause giving *maintenance* to the children, *until* their portions became payable; and another clause appointing his executors guardians for them. The question was, whether, as *Mary* never

(*h*) See *ante*, p. 531. For an instance where this doctrine was considered inapplicable, see the case of *Lloyd* v. *Branton*, stated *infra*, (A. 6.)

(*i*) 2 P. Will. 547. also *King* v. *Withers*, cited by Lord *Hardwicke* in *Reynish* v. *Martin*, 3 Atk. 334. Pre. Ch. 348. *S. C.* *Mercer* v. *Hall*, 4 Bro. C. C. 327. *ante*, p. 540. 3 Meriv. 116.

(*k*) Ambl. 662.

married with consent, her representatives were entitled to her portion? And Lord *Camden* determined in their favour; observing, it appeared from the whole will, that marriage with consent was not the sole period appointed for payment; but also the age of twenty-one. That this was obvious from the appointment of the *executors* to be *guardians* during the *minority* of the legatees, and consequently to *assent* to their marriages while infants; and the gift of *maintenance* also showed the intent that twenty-one was one of the periods when the portions should be paid, as such a provision was generally confined to the infancy of legatees. For those reasons, the Court declared the condition of marriage with consent, meant a marriage at an earlier time than twenty-one; so that *Mary*, having attained that age, took an absolute interest discharged from such condition.

Upon the principle of those cases, if a legacy be directed to be paid at the expiration of a year after the testator's death, with a condition of revocation, if the legatee married *B.*, and a limitation over in that event; should the legatee survive the time of payment, *i. e.* the year, and then marry *B.*, she will be entitled to the legacy notwithstanding the marriage.

This was decided in *Osborn* v. *Brown*,(*l*) where the testator gave to his daughter *Mary Brown* 400*l.*, to be paid in twelve months after his death; but if she married *John Osborn*, of, &c: then he revoked and made void the legacy, and gave her in lieu of it one shilling, and no more. *Mary* continued unmarried about fourteen months after the decease of the testator, and then married Mr. *Osborn*. Her right to the legacy having been disputed in consequence of that marriage, Lord *Rosslyn* ordered it to be paid to her with interest; upon the principle, that the event, upon which the bequest was revoked, was to be referred and restrained to the period during which the payment was suspended.

[a.] But suppose a legatee, where the bequest is made to her at twenty-one, or sooner upon a marriage with consent, with a limitation over if she die before that age, or be married with such consent, marries during minority without it, and afterwards attains twenty-one. It may be asked, Will she nevertheless be entitled to the legacy? It seems to be the better opinion that she is so entitled; and upon this construction of the bequest: The legatee was intended to have the legacy at twenty-one, without any qualification, if she lived so long; but as she might marry *before* that age, and have occasion for the money, and yet die a minor; she was also intended to take the legacy in that event, provided the marriage took place with the required consent. It follows, from this interpretation, that the effect of the condition depends upon the contingency of death under twenty-one; so that upon the legatee's attaining that age she will take the legacy, as if no condition whatever had been imposed in relation to it.

Accordingly, in *Austen* v. *Halsey*,(*m*) residuary personal estate was bequeathed, in trust for the testator's son *Henry Austen*, *when* and so soon as he attained twenty-one, *or married* before that age *with* the previous consent of guardians, or the majority of them then

(*l*) 5 Ves. 527. (*m*) 13 Ves. 126. 130.

living: "but if he should not attain twenty-one, or marry before that age with such consent and approbation as aforesaid," the property was given over to the testator's daughters. *Henry* attained the age of twenty-one, but married during minority, without the previous consent of his guardians. And Sir *W. Grant* declared, that *Henry*, upon attaining twenty-one, became absolutely entitled to the personal estate.

The same Judge made a similar decision in *Knight* v. *Cameron*,(*n*) where the bequest was to Miss *Douglas* of 1000*l.* to be paid as soon as she should attain twenty-one, and in case she lived to attain that age, "and not otherwise;" or upon her marriage, which should first happen, provided she married with the consent of the testator's executors, "and not otherwise;" but if she died before twenty-one, or being married with such consent as aforesaid, the legacy was otherwise disposed of. Miss *Douglas* married without any consent, and was a minor at the time of the decree. Upon a question as to her right to the legacy, Sir *W. Grant* said, the condition was *precedent*, and that Miss *Douglas*, before she could make a title to receive the money, must predicate of herself, *either* that she attained twenty-one, or had married with consent. The latter she could not do, and the former period had not arrived; so that her title at present was defective. His Honour, however, made the following declaration; that Miss *Douglas*, not having attained twenty-one, nor married with consent, is *not now* entitled: a declaration which implied her right upon arriving at the above age.

The terms in which the condition is expressed must decide the question, whether the marriage without consent before twenty-one will, or will not be fatal to the legatee. The above are instances, where, notwithstanding breaches of the conditions, the legatees were declared entitled to the legacies, upon attaining their ages of twenty-one. In those cases, the testators did not declare that marriage without consent should *determine* the *rights* of the legatees, but merely that they should not have them earlier than twenty-one, unless they married with consent. It was the intention (as has been observed,) that the legatees should, at all events, receive their legacies upon attaining twenty-one. But when the conditions are so framed, as to determine the interest of the legatees upon marrying *without* consent, as where the required assents operate as conditions *subsequent*, non-compliance with them will be fatal. For example: if the bequest be to *A.*, to be paid at twenty-one or marriage; but if *A.* die under twenty-one, or marry without the consent of *B.*, then to *C.*; marriage without consent before twenty-one will be a forfeiture of the legacy.

An instance of this kind occurred in *Chauncy* v. *Graydon*.(*o*) There trustees were directed to transfer *South Sea* stock to each child of the testator's nephew at twenty-one or marriage, they marrying with the consent prescribed in the will; "and in case any of the children died before twenty-one, *or should marry without consent* as aforesaid,"(*p*) their shares were to go over. Two of the

(*n*) 14 Ves. 389. (*o*) 2 Atk. 616.

(*p*) See Sir *W. Grant's* observations in regard to conditions precedent and subsequent, 14 Ves. 392.

children married during minority without consent; and it was contended, that if they lived to attain twenty-one, they, notwithstanding their marriages without consent, would be entitled to their legacies. But Lord *Hardwicke* was of a contrary opinion, and said, "it was the intention of the testator that there should be no new time which should arise, but the legacy to be absolutely gone."

It is observable, that the commencement of the clause containing the last bequest was similar to the cases before stated, but the clause by which the legacy is given over is different. There the legacies were given on *precedent* conditions, upon the happening of *one* of two events, the attainment of twenty-one or a marriage with consent; with a *mere declaration*, that if *neither* of them happened, the legatees were not to have the legacies. Hence, if *either* contingency did happen, the condition was satisfied; whereas, in the last case, the clause limiting over the legacy showed that a *subsequent*, not a precedent, condition was intended. The interest previously vested was expressly determined and given over, if the legatee died before twenty-one, or married without consent; consequently, it was the *intention* of the testator, as Lord *Hardwicke* observed, that there should be "no new time which should arise, but the legacy to be absolutely gone." The distinction is attended with nicety, but appears to be *substantial*, and it reconciles the last authority with the cases before stated.

(A. 6.)—As to conditions requiring marriages with consent being considered *in terrorem*.(*q*)

The doctrine upon this subject is thus stated by Lord *Hardwicke*: "It is an established rule in the Civil law, and has long been the doctrine of a court of Equity, that where a personal legacy is given to a child on condition of marriage with consent, this is not looked upon as a condition, but as a declaration of the testator *in terrorem*.(*r*)

However unsatisfactory the reason of the rule may appear, as it is difficult to suppose that a testator made use of expressions in a sense different from their obvious import; the rule nevertheless is clearly settled to the extent of Lord *Hardwicke's* statement, where the condition is *subsequent*, and there is no limitation over upon a breach of it. But that it is so settled where the condition is *precedent*, is not so certain, as has been shown in a preceding page.(*s*) Lord *Hardwicke* said, in the case before referred to,(*t*) "he did not find that the Civil or Ecclesiastical law made any distinction between conditions *precedent* and *subsequent*; but in both cases, the condition, as such, was merely void." This is certainly correct, if understood of that law as at first established; but not so sure, if it include all the modifications and alterations of the rule made from time to time in the latter ages of the *Roman* state.(*u*) One of those modifications is thus stated by *Swinburne*: "The testator doth make thee his executor, or give thee 100*l.* if thou do marry with the counsel or advice of his brother. If thou do marry *without* his counsel or advice, thou art excluded."(*x*) But he adds, if the advice be asked, the legatee was not obliged to follow it: a strange conclusion, to

(*q*) *Ante*, pp. 508. 530. (*r*) *Reynish* v. *Martin*, 3 Atk. 331. (*s*) p. *Ante*, 510.
(*t*) *Reynish* v. *Martin*, 3 Atk. 332. (*u*) *Ante*, p. 508.
(*x*) Swinb. pt. 4. sect. 12. art. 17.

reject the substance for the shadow. However, this limitation of the ancient rule bears closely upon the present subject; and it is but reasonable to doubt whether, in the times before alluded to, the consent of parents or guardians to the marriages of their children or wards might not have been the subjects of good conditions. The affirmative of the proposition is the more probable, since the rule of the Civil law, as finally settled, enforced every condition in restraint of marriage, which did not directly or indirectly import an absolute injunction to celibacy.(*y*) For those reasons, it is conceived, that when the condition is *precedent*, requiring the consent of *A.* to the marriage of *B.*, *B.* must obtain the consent, whether the legacy be limited over or not. That *B.* must do so, if the consent were restricted to his marriage under twenty-one or twenty-eight, is clearly settled by the cases,(*z*) upon the principle of necessity for *B.* to answer the description in the bequest. And, if the restraint be permitted up to the age of twenty-eight, there appears to be no solid reason why the condition should not be equally good, where a testator thinks proper to continue the partial restriction during the life of the legatee; for what other limit can be satisfactorily defined. The requisition of consent may in this instance be equally proper, as in the examples just produced, as from the mental weakness of the legatee, &c.

With respect to conditions *subsequent*, it is now an established rule (however unreasonable its foundation,) that, when there is no bequest over upon non-compliance with a condition requiring consent to marriage, the legacy is single and absolute; the condition being rejected as a mere declaration *in terrorem*. And it will make no difference, whether there be no disposition whatever of the fund, upon a breach of the condition, or the original legacy be reduced upon the happening of that event.

Accordingly in *Garret* v. *Pritty*,(*a*) the testator gave 3000*l.* to his daughter, part of it to be paid to her at twenty-one, or on marriage, which should first happen, and the remainder to be paid to her at the expiration of two years after attaining that age or marrying, which should first take place. But if she died before twenty-one or marriage, he gave the 3000*l.* to the defendant *Pritty*, a disposition which was disappointed by the daughter's marriage after mentioned. But the testator declared, in a subsequent part of the will, that if his daughter married before twenty-one *without* the consent of his worthy friend (a Mr. *Scriven*,) in case he were then living, the legacy should cease and be void, and he gave to his daughter, in lieu of it, 500*l.* only. The daughter married without the consent and during the life of *Scriven*; and, it is presumed, under twenty-one. Yet it was declared, that she was entitled to the entire legacy of 3000*l.*; and principally, as Mr. *Vernon* says, because it was not expressly devised over. But he was wrong in stating that the money was in the above event directed to fall into the residue; for the will contained no such direction.

The next case is an authority that, where there is no express disposition of the legacy upon a marriage without the requisite as-

(*y*) 2 Dick. 721. (*z*) See *ante*, p. 508. *et. seq.*
(*a*) 2 Vern. 293. stated from Reg. Lib. 3 Meriv. 120

sent, but a *power* of abridging it is delegated to another person, the condition will be considered equally *in terrorem*, as if the diminution of the legacy had been provided by the testator in his will.

In *Wheeler* v. *Bingham*,(*b*) 1500*l.* were given to each of the testator's grand-daughters, who should be living and unmarried at his death; and he desired that none of them should marry without the consent of their father and mother, or the survivor; and therefore, if any of them married without such consent, he revoked their legacies, declaring that they should not be entitled to any benefit under his will, further than what their father and mother, or the survivor, should direct. And he ordered that, after satisfaction of his legacies, if any money remained in the hands of his trustees, the same should be paid to his daughter for life, and after her death to the defendant *Bingham*. Mrs. *Wheeler* (one of the grand-daughters) married during the life of her father and mother, without their consent, and she notwithstanding claimed the legacy of 1500*l.* Lord *Hardwicke* determined the following points:—1st, that the condition was *subsequent;* 2d, that the revocation of the legacy, in the event of a non-compliance with the condition, was not equivalent to a limitation over of it; a determination in conformity with the last case; and, 3d, that the declaration, in regard to the legatees not being entitled to any further benefit under the will, than what the father and mother, or the survivor, should direct, did not operate as a devise over, as it only amounted to a *power* in both, or the survivor, to *abridge* the legacy; which had no other effect, than if the testator had reduced the bequest in his will, as in the preceding case; and that so much of the funds as was not appointed under the power, if exercised, would fall into the residue; a mode of devolution not equivalent to an *express direction* that it should sink into the estate when disposed of by the will.

It appears from the judgments in the preceding cases, that if the legacy be limited over to another person, upon the marriage of the legatee without consent, the executory bequest will take effect upon a breach of the condition, which in this instance is not considered *in terrorem*. "The true ground (says Lord *Hardwicke*,) upon which a court of equity has suffered the condition to effectuate, is *not the intention*, but the right of a *third person*; the being given over and vesting in that person, if the condition be not performed."(*c*) In illustration of this, his Lordship remarked, if the testator, in the last case, had *said* that, upon his grand-daughter marrying without consent, he *revoked* the legacy, and gave it to the father or mother to dispose of, such a declaration would have been a devise over.(*d*)

An example of this kind is afforded by the case of *Stratton* v. *Grymes*,(*e*) in which Mr. *Stratton* (a citizen of *London*,) having issue a son and daughter, bequeathed two-thirds of his legatory part to his daughter; but if she married under twenty-one without the consent of her brother, and his kinsman (two of his executors,) then 500*l.* should be deducted out of her share, and paid to his son. The daughter married without consent, and during minority, as is

(*b*) 3 Atk. 364. (*c*) 3 Atk. 367. (*d*) Ibid.
(*e*) 2 Vern. 357. ed. by Raithby, and see *Barton* v. *Barton*, ibid. 308.

presumed; upon which a question arose as to the effect of the condition; whether it was *in terrorem*. And the Court declared it was not to be so considered; for, upon the daughter's marriage without consent, an *interest* vested in the son, who was to be looked upon as a person in the contemplation of the testator, as well as his daughter.

In the last case, and in that proposed by Lord *Hardwicke* as above, the *particular* legacies were limited over. But whether a mere *residuary* bequest amounts to a disposition of the legacy within the rule, has been in practice the subject of considerable doubt. Perhaps the following distinction will be found correct. If the testator give no direction for the legacy to fall into the residue, a disposition of that fund cannot be a limitation over of the individual legacy, because it is not permitted to form a part of the residue. On the other hand, if the testator direct the legacy to fall into the residue, so that it becomes disposable as part of that estate, such direction will be virtually a limitation over of the particular legacy. With respect to the authorities; the case of *Amos* v. *Horner*(*f*) is not an authority, as it was never finally determined.(*g*) *Paget* v. *Haywood*, referred to by *Willes*, C. J, in *Harvey* v. *Aston*,(*h*) is too imperfectly stated to have much importance attached to it. *Semphill* v. *Bayly*,(*i*) decided nothing upon this subject, for the 1000*l*. bequeathed to *Elizabeth*, (the question in the cause,) was made payable to her at twenty-one or marriage, and no restraint upon her marriage was imposed by the testator as to that legacy. In *Wheeler* v. *Bingham* (before stated,) Lord *Hardwicke* expressly markst he distinction above mentioned. There was no direction, in that case, that the grand-daughter's legacy should fall into the residue; and although that estate was disposed of, his Lordship determined that the condition annexed to the legacy was merely *in terrorem*, and, consequently, that it did not fall into and pass with the residue to the residuary legatee. But he declared an opinion, that, if there had been an *express* devise, in the event of the legatee not performing the condition, that the money should sink into the residue, such direction would have amounted to a devise over of the *particular* legacy.(*k*) Lord *Thurlow's* observation in *Scott* v. *Tyler*, does not contradict Lord *Hardwicke's* opinion, for in that case there was no direction by the testator, that the benefits intended for *Margaret* should fall into the residue upon her marriage without consent. It is, therefore, only sound criticism to confine Lord *Thurlow's* expressions to the facts of the case before him; and as not intended to apply to instances, where there are express directions that on breach of the conditions, the legacies shall fall into the residue. His Lordship's words were these, "The will *before* us contains a residuary bequest. But that has been repeatedly and well enough determined to leave the legacy *in statu quo*. It only prevents that, which has not been disposed of already, whatever be its amount, from falling by the order of law, to the executor or next of kin."(*l*) Whatever may be the value of the above remarks, in order to prepare the reader for the decision of Sir *W. Grant*, M. R. in the following case; that

(*f*) 1 Eq. Ca. Abr. 111. pl. 9. (*g*) Forrest, 216. (*h*) 1 Atk. 378.
(*i*) Prec. Ch. 562. (*k*) 3 Atk. 368. (*l*) 2 Dick. 723.

determination is a distinct authority for the proposition; that wherever a testator *directs* a legacy, determinable upon a marriage without consent, to fall into the residue, which is made the subject of bequest, that is such a specific disposition of the individual legacy, as to pass it to the residuary legatee, upon non-compliance with the condition by the particular legatee.

In *Lloyd* v. *Branton*,(*m*) the trusts of 24,000*l.* were declared by the will of Mr. *Alderson* in favour of his four grand-nieces, to the following effect: The above sum was divided into four shares of 6000*l.* each, the dividends of one of which his trustees were directed to pay to the separate use of his grand-niece *Sarah* (then of age) for life, and the capital among her children at her death. Similar trusts were declared of the remaining shares in favour of his other grand-nieces (who were infants) and their children. But if any of his grand-nieces married without the consent of his trustees, the testator declared that they should forfeit the dividends bequeathed to them for life, and that the dividends and capital "should thereupon sink into and constitute part of the *residuary* of his estate, which he gave to his grand-nephews." The amounts of the shares were varied by two codicils, neither of which affected the question that arose upon the will. *Sarah* married Mr. *Barnard* at the age of twenty-six, without consent, and on the question, whether her legacy was forfeited? two points were made in her favour; first, that not being under twenty-one at the time of marriage, she was not within the compass of the condition, upon the principle of the authorities mentioned under subdivision (A. 5.);(*n*) or secondly, that the condition was merely *in terrorem*, since there was no bequest over of the legacy, the direction for its falling into the residue and the disposition, of such residue not being (as it was argued) a sufficient limitation over of the individual legacy, agreeably with preceding adjudications. To the first point Sir *W. Grant* answered, that the condition could not be confined to *Sarah's* minority, as she was twenty-one when the will was made. And as to the second, his Honour thus expressed himself: "In the present case, there is a direction that the forfeited bequests shall sink into and constitute part of the residue thereinafterwards bequeathed. It does not rest, therefore, on a mere declaration of forfeiture. There is an express disposition made of what is to be forfeited. It was said, that a direction that it shall fall into the residue is no more than the law would imply, and cannot therefore amount to a bequest over. But when it was decided that a residuary clause did not carry such a legacy, it was by consequence decided that it did not fall into the residue, for if it did, the residuary legatee would be entitled to it. What is here declared is, that that residue shall include in it the legacies declared to be forfeited. I am of opinion that there is in this case a valid devise over, and as the marriage appears to have been had without consent, it follows that the forfeiture takes place."

Previously to quitting the present subject, it is proper to notice a determination of Sir *Thomas Plumer*, which has not been considered as free from doubt.

The case alluded to is *Marples* v. *Bainbridge*,(*o*) where *Thomas*

(*m*) 3 Meriv. 108. 118. (*n*) *Ante*, p. 550. (*o*) 1 Mad. 590.

Marples bequeathed to his wife "should she survive and *continue* unmarried," all his personal estate for life; and he disposed of it after her decease. The widow married again, and the property for the remainder of her life was claimed by the testator's next of kin; but his Honour decided against such claim, holding that the bequest was a *condition*, and *in terrorem;* and consequently the widow, notwithstanding a breach of it, was entitled to the property for life.

The objection to this decree is, that it is founded in mistake (as is presumed) from not distinguishing between a *limitation* and a *condition*.(*p*) Whether a limitation or condition is *intended* by a testator, is to be ascertained from the whole of his will; technical words to constitute either of them not being required in testamentary cases.(*q*) That a limitation, in the present instance, was intended, seems apparent from the terms of the bequest. The gift in substance is made to the wife for life, or *quousque* a second marriage. Upon the happening of either event her interest was to expire. It was one of the natural periods at which her estate was to determine: a benefit intended *durante viduitate*, and no longer; so that upon the happening of either contingency, the interest which was only so long granted must cease. In such a case, the doctrine of conditions *in terrorem* is wholly inapplicable, as appears from Lord *Hardwicke's* decree in the following case:

In *Richards* v. *Baker*,(*r*) Mr. *Richards* bequeathed to his wife his goods, furniture, &c. in or belonging to his house at *Edmonton*, "so long as she continued his widow and no longer;" and he disposed of his residuary personal estate, but gave no direction as to what was to become of the articles, &c. bequeathed to his wife, in the event of her second marriage. Lord *Hardwicke* declared, that she was entitled only to the use of them *during her widowhood*.

The difference between those two cases is, that in the first case the widow's interest is determinable upon her death or marriage; and by the second, upon her marriage only. There was in neither a limitation over of the legacy upon the widow's marriage. The case before Lord *Hardwicke* was not cited to Sir *Thomas Plumer*, and it is presumed that, had it been mentioned, his Honour would have pronounced a different decree than was made in *Marples* v. *Bainbridge*.

B.—Conditions requiring marriages with persons bearing the surnames of testators.

Whether the *mere assumption* of the surname of a testator will be a performance of a condition requiring the legatee to marry a person of that name, previous to the vesting of the legacy, does not appear to be *clearly* settled. The objection to such a mode, *viz.* the fraud which may be committed upon the testator's intention, by the adoption of the name before the marriage with a view to the legacy, and then abandoning the assumed name after receipt of the money, does not seem to be obviated by the obtaining of an Act of Parliament or a royal license. The former, in *giving* a new name, does not abolish the old. So that the party may, if he think proper, use his old name upon every occasion, and accept gifts or legacies by it alone.(*s*) The latter is a mere permission to take the new name,

(*p*) See several cases upon this distinction collected *ante*, p. 526. *et seq.*
(*q*) *Ante*, p. 502. (*r*) 2 Atk. 321. (*s*) 15 Ves. 100.

does not give it, and is nothing more than a voluntary assumption of it. If then neither of those methods in taking the new names removes the objection to its voluntary assumption, it seems but reasonable that as by that mode the condition is strictly and literally performed, it should be considered sufficient to entitle the legatee to the legacy.

Sir *Joseph Jekyll*, M. R. (a Judge of no little authority) declared such to be his opinion, in the case of *Barlow* v. *Bateman*. And although his decree was reversed in the *House of Lords*, the ground of the reversal may possibly have been different from what is usually inferred from the argument of the appellant's counsel appearing in the printed report, as we shall more particularly notice. That was a case of mere assumption of name, upon the eve and on account of the marriage. And his Honour said, "I am of opinion, that the condition is complied with by the defendant's taking the name of *Barlow*. Surnames are not of very great antiquity, for in ancient times the appellations of persons were by their *christian* names, and the places of their habitations, as *Thomas* of *Dale*, *viz.* the place where he lived.(*t*) I am satisfied the usage of passing Acts of Parliament for the taking upon one a surname is but *modern*, and that any person may take upon him what surname, and as many surnames, as he pleases, without an Act of Parliament."(*u*) With this opinion *Abbot*, C. J. coincided, in the recent case of *Doe* v. *Yates*, in which he expressed himself to the following effect. "A name assumed by the voluntary act of a young man, at his outset into life, adopted by all who know him, and by which he is constantly called, becomes, for *all* purposes that occur to my mind, as much and effectually *his* name, as if he had obtained an Act of Parliament to confer it upon him." Upon the whole, the following rule may probably be laid down as the criterion to determine those cases:

Where nothing appears upon the will declaratory of the testator's intention, except that the legatee is to marry a person bearing his surname, the assumption of that name before the marriage will be sufficient. But where, in addition to this requisition, the context of the will sufficiently shows, that by the words "name," or "surname," the testator meant to designate a person inheriting it from his father (as in the instances mentioned in the second chapter),(*x*) neither the assumption of the name or surnane with or without an Act of Parliament, nor by royal license, will be an effectual compliance with the condition. With respect to the authorities applicable to the effect of a voluntary assumption of name—

In *Barlow* v. *Bateman*,(*y*) Mr. *Barlow* bequeathed to his *kinswoman*, *Mary Barlow*, 1000*l.* payable at twenty-one or marriage; but if she died under that age or unmarried, he gave the legacy to his *kinsman*, *Charles Barlow*. The will then proceeded, "In case the said *Mary Barlow* shall marry with any person of the *surname* of *Barlow*, then I give her the *further* sum of 1000*l.* to be paid on the day of such marriage with a *Barlow* aforesaid. But if the said *Mary Barlow* shall die unmarried, or shall marry a person *not bearing* the surname of *Barlow*, then I give the last-mentioned 1000*l.*

(*t*) See *Camden's* remains concerning Britain, ed. 1637. p. 141. stated 5 Barn. & Ald. 552. in a note. (*u*) 3 P. Will. 66. (*x*) *Ante*, p. 102, &c.
(*y*) 2 Bro. Parl. Ca. 272. 8vo. ed. 3 P. Will. 65. *S. C.*

to the said *Charles Barlow*." Soon after the testator's death, *Mary* married the respondent *Robert*, whose father's surname was *Bateman;* and *Robert* was christened, called, and known by the name of *Robert Bateman;* but on the occasion of the marriage, and not before, he *assumed* the surname of *Barlow*, to entitle himself to the additional legacy. *Charles*, the appellant, conceiving, that by the above marriage he became entitled to the conditional legacy of 1000*l.* commenced a suit to procure it, but his bill was dismissed by Sir *Joseph Jekyll*, who thought that as *Robert* bore the surname of *Barlow* at the time of the marriage, the condition was well performed; and, upon a bill filed by *Robert*, he ordered both legacies to be paid. *Charles* appealed from both decrees, on the latter of which his appeal was dismissed for irregularity, the decree not having been signed by the *Chancellor;* but the first decree was reversed, and, from the tenor of the argument for the appellant, it might be inferred, that the reversal was founded upon the principle, that *Robert* could not, without legal authority, take the surname of *Barlow*.

But the judgment of the House of Lords may have been founded upon a different reason; the particular intention of the testator as collected from the expressions in his will. It might have struck their Lordships, from the language of the bequests, that the man pointed out for *Mary* to marry of the surname of *Barlow*, was not meant to be a person taking it either by voluntary assumption or under legal authority, but an individual entitled to it by birth, as in the instances before alluded to. It is observable, that the only persons, objects of his provision, were two distant relations, *Charles* and *Mary Barlow*, whom he expressly describes as his *kinsman* and *kinswoman*. Relationship was the cause of the testator's bounty, and his object to divide his property among such of his relatives whom he knew to stand in that character. Both the legatees bore his surname by birth-right, and on the ground of being of his stock or family. Under such circumstances, it is not unreasonable to presume, that the *Lords* considered the condition imposed by the testator upon his *kinswoman Mary* to marry a *Barlow*, as designating a *Barlow* of his own kin or family, and not any stranger capriciously assuming that surname. At least, if this be a possible supposition, which might have had influence with the House of Lords, it destroys the authority of the case, for the proposition (as supposed by Baron *Thompson* in *Leigh* v. *Leigh*,(*z*) "that a devise upon condition of marrying a man of a particular name is not satisfied by marrying a man who voluntarily changes his name." And it leaves the judicious remarks of Sir *Joseph Jekyll* and Chief Justice *Abbott* of the same weight and importance as if the decree of the former had not been reversed. That the judgment of the House of Lords was founded upon the special circumstances before suggested, was so considered by *Lawrence*, J. in the case of *Leigh* v. *Leigh* above mentioned.(*a*) And it is conceived that it may be correctly stated as a general proposition, "that a condition to marry a person of a particular name will be well performed by a voluntary assumption of it previously to the marriage."

Indeed the case of *Doe* v. *Yates*,(*b*) before referred to, must be

(*z*) 15 Ves. 111. (*a*) Ibid. 107. (*b*) 5 Barn. & Ald. 544.

considered an express decision upon the subject; for, although the condition was *subsequent*, and for that reason to be construed strictly, yet if the arbitrary assumption of the name was illegal or ineffectual, it must have been considered as not at all taken, and then the event upon which the limitation over was to take place would have happened.

In that case, Mr. *Luscombe* devised his real estate for the benefit of his cousin, *John Luscombe Manning*, during his minority, and when he attained twenty-one, to the use of him for life, he taking and bearing the name of *Luscombe*, instead of his own surname; remainder to the use of his first and other sons in succession, and their heirs male, they taking and using the surname of *Luscombe* instead of their own, with remainders over. Then followed a proviso and direction for each devisee *not bearing* the surname of *Luscombe*, so soon as they respectively should be in *possession* of the estate, to take the surname of *Luscombe*, and use it instead of his own; and within *three* years next afterwards to procure the change of surname by Act of Parliament or other effectual manner, and for ever in future to bear and use the surname of *Luscombe*. But if any of the devisees, who should be in possession of the estate, should not take and use that surname, and should neglect to get the Act of Parliament, or other sufficient authority for the above purpose, within three years next after being in possession of the property, his interest should cease and be void, and the estate go over to the person next in remainder, who should comply with the condition. *Manning*, the devisee, while a minor, and before entering into possession of the estate, voluntarily assumed the surname of *Luscombe*, and ever afterwards used and bore it; but he did not, after entering into possession of the property, procure an Act of Parliament or a royal license to take that surname. The question was, whether the mere assumption of the surname was a compliance with the condition? And the Court of *King's Bench* was of opinion in the affirmative, upon the principle, that, as the devisee bore the name of *Luscombe* at the time he entered into possession of the estate, although by mere arbitrary assumption, the condition was fulfilled, and the requisition of an Act of Parliament or other legal authority, to change the old and take the new name, only applied to persons who did not bear the surname of *Luscombe* at the period they took possession of the property; so that, as Mr. *Manning* had previously assumed that surname (a voluntary assumption being sufficient,) he was not an object within the meaning of the proviso, and consequently not bound by it.

From the preceding contents of this chapter, it appears that the principle upon which the literal performance of conditions was dispensed with, was the presumed intention of testators imposing them, and not *compensation* as upon a forfeiture. Indeed, the doctrine of equitable relief upon compensation is quite inapplicable to breaches of conditions requiring marriages with consent, and a court of equity has never proceeded upon such a ground.(c) It has been said, that where time or place is a secondary consideration, if the thing required to be done is performed, though at another time or place, so as

(c) See *ante*, p. 515.

that the testator's intention is fulfilled, the performance shall be deemed a sufficient execution of the condition.(*d*) In order more particularly to illustrate these remarks, it is proposed to offer a few examples under the title—

Sect. III. Respecting Forfeiture generally, in consequence of the non-compliance with conditions.

First, where a bequest is made to *A.* upon a *precedent* condition, viz. if he pay to *B.* 1000*l.* or execute a release of all demands, within twelve months after the testator's death; and there is no limitation over upon non-compliance, if *A.* pay the money or execute the release, although not within the twelve months, he will be entitled to the legacy; because it is considered, that payment of the money and the execution of the release are the sole motives of the testator in imposing the condition,(*e*) and that his intention is fulfilled when those acts are executed. But—

Second.—If the Legacy had been limited over to *C.* in the event of the 1000*l.* not being paid, or the release given within the twelve months, the bequest over to *C.* would take place; because the *time* of performance was made an essential by the testator, in expressly limiting over the legacy to *C.*, if neither of those acts were done within the specific period.(*f*)

Third.—When the performance does not solely depend upon the legatee, the Civil law does not seem consistent, in deciding when a non-compliance shall and shall not be a forfeiture.(*g*) Possibly the determination in the tribunals of this country may be as follows: If a legacy be given to *B.* in case he marry *D.* the testator's daughter: here the performance of the condition depends upon the *proposal* of *B.* and the *acceptance* of *D.* If *D.* refuse *B.*, it is apprehended, that the offer and readiness of *B.* to marry her, will not be considered a performance of the condition, because the condition being *precedent*, *B.* cannot answer the description in the bequest as the person to whom the gift applies.(*h*) Besides, the procuring of *D.'s* consent is a contingency, which must have been in contemplation of the testator; and *an obligation* meant to be imposed upon *B.*, the result of which was to decide whether he was to receive the legacy, or not.(*i*) But—

Fourth.—Had the condition been *subsequent*, as if the gift were made to *B.* payable at twenty-five, with a proviso, in case he did not marry *D.* before that age, the bequest should cease and be void; here the refusal of *D.* to marry *B.* is of no consequence; for, the condition being merely *in terrorem*, the non-compliance with it does not create a forfeiture.(*k*) But if the will contain a limitation over of the legacy, in case he did not marry *D.* within the above period, then it is presumed, that if the marriage do not take place, whether from the neglect or the refusal of *D.*, the limitation over will be effectual, for the reason before mentioned.

(*d*) *Et vide* Swinb. pt. 4. sect. 6. art. 2. and *ante*, p. 505-6.
(*e*) *Ante*, p. 514. (*f*) *Vide ante*, p. 515. *et seq.*
(*g*) Swinb. pt. 4. sect. 6. art. 2. and sect. 8. art. 16. and 17.
(*h*) *Ante*, p. 508. *et seq.*
(*i*) As to the effect of *endeavours* to perform conditions, see *Smith* v. *Wilson*, 8 East, 443. and the authorities referred to in that case. (*k*) See *ante*, p. 554.

But possibly a legatee may be ignorant of the testamentary benefit bequeathed to him; to which cause the non-performance of a condition annexed to the legacy may be imputed. It may, therefore, be necessary to consider,—

SECT. IV. The duty of executors to give notice to legatees of conditions upon which the legacies are to take effect or be devested.

1. When the subject is personal estate.

It seems that legatees must obtain information of conditions annexed to their legacies, as executors are under no obligation to give notice of them, unless by particular direction. Hence it follows, that it will not be a sufficient excuse for a breach of the conditions, for the legatees to allege and prove they had no knowledge of the terms upon which their legacies were given.

In *Chauncy* v. *Graydon*,(*l*) legacies of 1000*l. South Sea* stock were bequeathed to *Peter* and *Cassandra Tahourdin* at twenty-one, or on marriage with the consent of their father, &c. with a limitation over, upon their death before that age, or marriage without consent. They broke the condition, and alleged in excuse their ignorance of it. But Lord *Hardwicke* determined that circumstance to be insufficient to prevent a forfeiture; upon the principle, that "where a condition is annexed to a devise of *real* or *personal* estate, and no notice required by the will to be given, nor any person obliged to give it, the legatees must perform the condition, or cannot be entitled; and if they omit to do so, a forfeiture incurs when there is a limitation over."(*m*). Consequently, where no person is bound to give, the parties themselves, must take notice, as in that case; the testator not having imposed any obligation upon his executors to give it. This doctrine was assented to by Sir *W. Grant* in the case of *Burgess* v. *Robinson* before stated.(*n*) And the law is the same in dispositions of *real* estates; which leads us to the consideration—

2. Of the necessity for giving notice of conditions annexed to devises of real property.

The following distinction prevails upon this subject, when the devisee is *heir at law*, and when he is a *stranger*, *viz.* that notice is necessary to be given to the heir, before a forfeiture can attach for a breach of the testamentary condition; but that no such notice is required to be given to the stranger; and upon this reasoning: The heir has a title paramount the will, *i. e.* by *descent*, and he is presumed to enter and claim in that right. As, therefore, the devise is not necessary to his title, he will be considered to know nothing of it, nor of the condition, until he receive notice. But the stranger has no title, except under the will imposing the condition. Hence he is presumed to have knowledge as well of the condition as of the devise.(*o*)

(*l*) 2 Atk. 616 (*m*) 2 Atk. 619. (*n*) *Ante*, p. 516.
(*o*) See the following cases: Frances' case, 8 Rep. 89. b. *Porter* v. *Fry*, 1 Ventr. 199. 1 Mod. 300. 314. Sir T. Rayam. 236. *Malloon* v. *Fitzgerald*, 3 Mod. 28. Skin. 125. *Whaley* v. *Read*, Lutw. 804. 809. *Burleton* v. *Humfrey*, Ambl. 259. and *Doe* v. *Beauclerk*, 11 East, 657. *Randall* v. *Eeley*, Cart. 92. 170. is not law, and see Lord *Ellenborough's* comments upon it in the last case.

In *Doe* v. *Beauclerk*, referred to in the last note, Lord *Ellenborough* expressed his sentiments upon the propriety of the following distinction, "where a party is really ignorant of the existence of the instrument, in which the condition is contained, and where he would have good title if there were no such instrument, it seems *unreasonable* to hold that a neglect of the terms of that condition should subject him to a loss of the estate. It would encourage the concealing of the instrument, until a breach were incurred, so to decide. And no substantial inconvenience can result from holding that the person entitled to avail himself of a breach, should take care that the condition was known to the person who was to comply with it." And in that case, the Court founded its opinion upon the broad ground that neither *neglect* nor *refusal* will subject the devisee, who is *heir*, to lose the estate, unless he has notice of the condition.

CHAPTER XIV.

Of the assent of Executors to, and the payment and appropriation of Legacies.

SECT. I. Of the Executor's assent.

1.—*The* necessity *and* effect *of it.*
2.—*Nature of legatee's interest prior to assent.*
3.—*Consequences of legatee's taking his legacy without assent.*
4.—*When and by whom assent may be given.*
5.—*What will be a good assent.*
A.—*Where the* absolute *interest is given to the legatee.*
B.—*Where the fund is given in* succession.
C.—*Where a* partial *interest is given to an executor.*
6.—*Presumptive assent.*
7.—*Conditional assent.*
8.—*The retracting of assent.*

SECT. II. Of the payment of Legacies.

1.—*Out of what fund.*
2.—*Whether in* sterling *money or in* currency.
3.—*By whom the exchange is to be paid.*
4.—*At what time legacies to be paid.*
A.—*When the bequest is of a* gross *sum of money.*
B.—*When of an* annuity.
C.—*Of apportionment of annuities and dividends in the nature thereof.*
5.—*To whom to be paid.*
A.—*When legatee is an infant.*
B.—*When a married woman.*
C.—*When a lunatic.*

D.—*When a bankrupt.*
E.—*When to a legatee abroad, and not heard of.*
6.—*As to deductions and retainer under the* stamp acts.
A.—*In respect of what legacies liable, and the quantum.*
B.—*By whom to be paid or retained.*
C.—*At what time payable,* &c.
D.—*Retainer by executor:*
1. *for his own benefit.*
2. *for the benefit of another.*
7.—*Retainer by executors generally by way of sett off against legatee's debt.*
8.—*Presumptive payment of legacies.*

SECT. III. *Of the appropriation of Legacies* of Money or Stock.

1.—*Legatee's right to appropriation.*
2.—*Of appropriation* in pais.
3.—*Of the effects of appropriation on the fund itself.*

SECT. I. Of the Executor's assent to Legacies.

1. ITS necessity and effect.

The law makes an executor, to the amount of the assets, responsible to every person having demands upon his testator. In order to enable the executor to administer the estate properly, it vests it absolutely in him; and as it trusts to him the due administration of the fund, according to the different natures of the claims thereon, it also prohibits persons having demands upon the estate from appropriating any parts of it, in satisfaction of their claims, without the previous consent of the executor.(*a*) Hence follows the necessity for a legatee to procure the executor's assent to the property bequeathed to him; for until that consent be obtained, his title is incomplete. As this requisite of consent is founded upon the duty of the executor duly to administer the assets, and the personal responsibility which he incurs upon a breach of it, it is a consequence, that his assent is only necessary in instances falling within the range of his office as executor, and not to devises of freehold estates in fee, for life, or for terms of years;(*b*) but whatever are personal assets to be administered, whether chattels personal or real, and whether *specifically* or generally bequeathed, they cannot be taken possession of without the concurrence of the executor.

It may however be a question, whether, if a person by his will forgive or release his debtor the money owing to his estate, such release or forgiveness will require the assent of the executor before it can take effect; but it seems that the executor's assent is necessary, for the debt may be wanted to pay creditors, and against them it

(*a*) Swinb. pt. 1. sect. 6. art. 5. Co. Litt. 111. Perk. sect. 488. 570. 572. *Bolles* v. *Nyseham*, Dy. 254. b. 2 Atk. 77. (*b*) 15 Ves. 579. Touchst. 455.

must be considered as a legacy; so that the case falls within the general rule, which requires the executor's assent previous to the vesting of legacies.(*c*)

With respect to government stock or annuities, it appears to have been the practice of the Bank of *England*, grounded upon the statute 5th *William* and *Mary*, cap. 20, by which the Bank was instituted, and upon the other Acts of Parliament which regulate the devise of property transferrable at the *Bank*, (by which the probates of wills are directed to be there deposited, for the purpose of having the trusts extracted,) that where stock, &c. has been specifically bequeathed, without the intervention of trustees, to permit the transfer to be made to the legatees, and not to the executor; and when trustees have been appointed, then to the trustees, with a restriction not to allow of a transfer to any other persons, except those named in the will. It seems, however, that this practice is erroneous, and that the executor having the legal right to the specific as well as to the general assets, to pay debts, &c. has the sole right to call upon the Bank to transfer the stock into his name; as no interest in it vests in the legatees prior to his assent. It also appears to be immaterial whether such property be given *specifically* in the strict sense of the word, or as a *residue*; such property being to be considered in no other view than the other general assets as to this purpose, and therefore subject to all the incidents of a testamentary disposition of personal estate.(*d*)

With respect to the effect of the executor's assent—

The consent creates no new title, but merely perfects that which is derived under the will; consequently, if the bequest be void, the assent of the executor is nugatory.(*e*) But when the devise is good, and consent is given, the title of the legatee *from* the testator will be complete; and although the executor may have wasted the assets, the persons affected by it can only have redress against the executor personally.

Accordingly, in *Foster* v. *Spencer*,(*f*) it was said, if lessee for years devise his term to another, appoint executors, and die; and the executors commit waste, and afterwards assent to the bequest, although between the executors and the devisee it has *relation*, and the latter is *in by* the *devisor*, yet an action of waste shall be maintained against the executors in the *tenuit*.

By assent the legal interest, which the executor had in the fund, ceases,(*g*) and the entire property, *legal* and *equitable*, becomes vested in the legatee.

2. In regard to the nature of the interest of a legatee, *previously* to the executor's assent.

Although, as we have seen, the assent of the executor be necessary to complete the title of the legatee; yet, *before* such assent, the legatee takes an *inchoate* right in the subject, which may be forfeited; and it is transmissible to his personal representatives, in the event of no disposition by will.(*h*) But—

(*c*) Ves. sen. 1. 50. and see *ante*, p. 325. *et seq.*
(*d*) *Bank of England* v. *Moffat*, 3 Bro. C. C. 262. *Bank of England* v. *Parsons*, 5 Ves. 665. *Bank of England* v. *Lunn*, 15 Ves. 569.
(*e*) *Bransby* v. *Grantham*, Plowd. 525.
(*f*) Cited in Saunder's case, 5 Rep. 12. b. and see *ante*, p. 314. *et seq.*
(*g*) Bridg. 55. (*h*) Off Ex. 236.

3. Suppose the legatee to take his legacy without the consent of the executor, what will be the consequences?

He will be liable to an action of trespass or trover by the executor.(*i*) And it has been alleged and admitted, that if the devisee of a term for years enter upon the lands without the executor's permission, he will be considered a disseisor.(*k*)

Besides, if, before the executor have proved the will, or undertaken the trusts of it,(*l*) a legatee intermeddle with the estate, by taking possession of the property bequeathed to him, without the executor's leave, he will not only be liable to the action of the executor after probate, but also in the mean time to the suits of the testator's creditors, as an executor *de son tort*. But if, before any action be commenced, he pay over to the lawful executor the whole of the assets he received, that act will purge the original *tort*, and entitle him to the plea of *plene administravit*. This doctrine seems to have been settled by the cases referred to in note.(*m*)

We shall now consider—

4. By whom assent may be given.

Where an executor is appointed, he may assent to a legacy before he proves the will.(*n*) And in instances where there are two or more executors, the assent of any one of them is sufficient.(*o*) So also, if one of the executors be a legatee, his single assent to his own legacy will vest the complete title in himself;(*p*) and, according to *Perkins*, even before probate or administration.(*q*) Again, if the subject be entire, and be given to all the executors, the assent of one of them to his own proportion will be sufficient.(*r*) But if an executor-legatee *renounce* probate, by which act he places himself in the same situation as if he had never been appointed to that office, his assent to his own legacy will be ineffectual,(*s*) and if he take it without the permission of the lawful administrator, he will incur the same liabilities as any other legatee so acting, and which we have before mentioned.

When the executor is an infant, the Ecclesiastical Courts grant administration to a person *durante minore ætate* of the infant; but the law in such case is now very different from what it formerly was. By the Civil law followed by those courts and adopted by our own,(*t*) infancy determined at the age of seventeen; at which time probate of the will was granted to the executor, who, from that period, was competent to discharge the duties of the office. The powers of the administrator during infancy were confined to the performance of mere acts of necessity. None were permitted which might be in the least degree prejudicial to the infant. He might assent to a legacy; but if there was a deficiency of assets, such assent would have been void.(*u*) In like manner, after the executor attained his age of seventeen, he was at liberty to assent to a legacy; but as he still continued by the law of this country

(*i*) Off. Ex. 27. (*k*) Owen, 76. (*l*) Read's case. 5 Rep. 34.
(*m*) *Padget* v. *Priest*, 2 Term. Rep. 97. *Curtis* v. *Vernon*, 3 T. R. 587. *Mountford* v. *Gibson*, 4 East, 441. 452.
(*n*) Off. Ex. 49. Godolp. Orph. Leg. 144. Dyer, 372. 2 Freem. 23.
(*o*) Off. Ex. 223. 3 Atk. 510. (*p*) 1 Roll. Abr. 618. (*q*) Sect. 572.
(*r*) 1 Roll. Abr. 618. (*s*) *Broker* v. *Charter*, Cro. Eliz. 92.
(*t*) Piggot's case, 5 Rep. 29. a. Cro. Eliz. 602. *S. C.* (*u*) 1 Vern. 328.

under the disability of infancy, and, therefore, under its special protection, it would not give validity to any acts which affected him personally, or his estate ;(*x*) so that, if he assented to a legacy, when there was a defect of assets, the assent was void. This state of things, attended as it was with great practical inconvenience, induced the legislature to interpose, and by a statute passed in the reign of the late king,(*y*) it was enacted, that where an infant is sole executor, administration with the will annexed shall be granted to the guardian of the infant, or to such other person as the spiritual court shall think fit, until the infant shall have attained the full age of twenty-one ; at which period, and not before, probate of the will shall be granted to him. And that the person, to whom such administration shall be granted, shall have the *same powers* vested in him, as an administrator by virtue of an administration granted to him *durante minore ætate* of the *next of kin:* that is, he shall be complete and absolute administrator for every purpose during the continuance of his office, and may, upon his own responsibility, perform the same acts as the next of kin, in the one case, and the infant executor, in the other, might have done, if they had been of age, and administration had been granted to them personally.(*z*) This statute, therefore, has altered the preceding established law upon this subject; consequently, an administrator *durante minore ætate* of an infant executor may, under any circumstances, give a valid and irrevocable assent to a legacy.

If an executrix be a married woman, the assent of her husband to a legacy will be sufficient, for as the law authorizes him to administer in right of his wife, the power of assenting or dissenting to a bequest is incident to that general authority.(*a*) But it seems to have been formerly matter of doubt, whether a married woman appointed executrix was competent to assent to a legacy, without the privity and concurrence of her husband. The doubt, however, appears to have been removed by the decision in *Russel's* case,(*b*) according to which, as she is adjudged incapable of releasing a legacy, without her husband, by reason of the injury he might sustain ;(*c*) so her assent to a legacy without his permission must be nugatory and ineffectual; and of this opinion was the Court in the case of *Cookes* v. *Bellamy*.(*d*)

The next subject is—

5. What what will be a good assent. And first,

A.—Where the absolute interest is given to the legatee.

Assent may be either express, or implied: but, since the assent to a legacy by an executor is in its consequences of great importance to him, it is but reasonable that the act or expressions deemed sufficient to impart that assent, should be unambiguous. They ought to be such as to leave no doubt in the mind of a Judge, that the executor meant to confer his assent to the vesting of the bequest.

It is stated in a book of great authority, that if the executor say to a legatee, "God send you joy of your legacy," those expressions will amount to an assent ;(*e*) a proposition, which it is presumed,

(*x*) Prince's case, 5 Rep. 29. b. (*y*) 38 Geo. 3. c. 89.
(*z*) 1 Com. Dig. tit. Administration (F.)
(*a*) See "Law of Husband and Wife," 1 vol. p. 184. 1 Leon. 216. Off. Ex. 321.
(*b*) 5 Rep. 27. b. (*c*) Cro. Car. 519. (*d*) Sid. 188. (*e*) Touchst. 456.

ought to be received with qualification. For suppose an executor, before he has ever had the opportunity of examining the testator's affairs, and at the time when the will is opened and read, perceive that a friend, one of the executors, is numbered in it, upon which he expresses himself to the above effect, it would be very unreasonable to construe words of congratulation into terms of assent to the legacy, so as to involve the unsuspecting executor in the consequences of a *devastavit*. On the other hand, if those expressions be uttered, after the executor has had sufficient time to acquaint himself with the state of the assets, there seems to be fair ground for applying them to an intention of assenting to the bequest.

When the executor informs a legatee, that he intends him to have the legacy according to the devise, there can be no doubt of his meaning to impart his assent by those terms.(*f*) But when the expressions are more equivocal, as suppose the executor to say upon application for the legacy, "that the testator has left all to him," such or the like phrases will not be converted into assent.(*g*) If, however, he had declared, that "the money lay ready for the legatee whenever he would call for it," such a declaration would have been a good assent to the bequest.(*h*)

In agreement with the distinction before noticed, if an executor *request* the legatee to dispose of his legacy, his assent is necessarily implied.(*i*)

Or if the rents or interest of a bequest be directed for the maintenance of the legatee during minority, and the executor commence so to apply them, his consent to the principal will be presumed.(*k*)

Upon the same reasoning, it will be a good assent to the bequest, if the legacy be subject to a charge, which is paid by the executor; for assent to the charge is assent to the disposition of the fund, out of which it is to be satisfied.(*l*)

When a legacy is *absolutely* given to an executor, his assent to take as legatee must be governed by the distinctions before noticed. If he expressly declare that he assents to his legacy, there can be no question; but if he merely possess and use the property, consistently with his office of executor, such a possession of it can never be considered as a constructive assent to the bequest.(*m*)

Suppose then the executor to say "he will take his legacy according to the will;" that is an election to take it as legatee.(*n*)

Or, suppose the subject bequeathed to an executor be a term for years, and he apply the rents to his own use;(*o*) or if, in disposing of the term he recites in the instrument that he has it by devise;(*p*) or, if there be other executors, and he enter into possession of the term *in exclusion* of his co-executors.(*q*) In these, and similar cases, he will be considered as having assented to the devise, because such acts manifest that he dealt with the term not as executor but in the character of specific devisee of it; and indeed, if the constructive assents last mentioned, were in their consequences to make the executor guilty of a *devastavit*, still he will have the value of the

(*f*) Touchst 456. (*g*) 1 Roll. Abr. 620. (*h*) Cowp. 293.
(*i*) *Lampet's* case, 10 Rep. 47. a. 52. b. Off. Ex. 322.
(*k*) Leon. Rep. 129. *Paramour* v. *Yardley*, Plowd. 539.
(*l*) 1 Stra. 70. (*m*) 10 Rep. 52. b. *Baker* v. *Hall*, 12 Ves. 501. (*n*) 1 Lev. 25.
(*o*) Roll. Abr. 619. (*p*) Ibid. 620. (*q*) Dyer, 277. b.

whole term as an equivalent to indemnify himself against those consequences. This would not be the case, however, if the devise had been to him for life only; and this consideration has induced the law to require stronger evidence of assent in the latter than in the former case,(*r*) as will be shown in considering—

B.—What will be a good assent, when a legacy is given to persons *in succession.*

Where a legacy is limited to several persons in the nature of remainders by executory devise, the executor's assent to the first taker will be considered an assent to those who are to succeed; *e converso* his assent to one of the subsequent takers will enure to the benefit of the persons who take prior interest in the property bequeathed; and the reason is, because the several interests of the legatees constitute in the whole but one estate. If, therefore, a term for years were devised to *A.* for life or years, or for so long as *A.* continued unmarried, with remainder to *B.* and the executor assented to the interest of *A.* such assent would extend to *B.* so as to vest his interest. In like manner, if the assent had been given to *B.* it would have enured to *A.*(*s*) And the same rule seems to hold in bequests of chattels personal, for if the use of a book, glass, &c. were bequeathed to *C.* with an absolute gift of it after *C.'s* death to *D.* an assent to *C.* would also vest the interest which *D.* took by the will.(*t*) The law is the same (though it seems to have been once otherwise,)(*u*) *whether* the subsequent legatee be entitled to a rent given out of a term, and not to the remainder of the term itself. Accordingly, if a term were devised to *A.* for life or for years, with a rent out of it to *B.* the assent of the executor to *A.* or to *B.* would, in either case, enure to the benefit of both;(*x*) and perhaps for this reason; as the assent of the executor is required as well for the benefit of creditors, as for his own safeguard, an inference arises from his assent to one of the legatees of the specific property, that he has no occasion for the term or rent to pay debts; for if he had, then his assent to either of the legatees would be improper, as both ought to abate *pro rata.* What will amount to an assent, has been considered in the preceding subdivision.

C.—Such appears to be the law, when none of the legatees are executors, but when the first devise of a chattel is to an *executor* for life, with a limitation to those persons in succession, the law requires a stronger indication of the executor's assent to his *partial* interest, than where the entire property in the subject is bequeathed to him. The reason of this distinction is stated by *Gibbs*, C. J. in the following words: "It is clearly settled, that where an executor takes an interest in a leasehold estate for *life*, he must do *something more than enter* in order to give assent to his legacy; but where his interest is *absolute*, his entry does assent to the legacy: there is a substantial reason for this distinction; for if his general entry on his life estate were an election to enter as legatee, it would necessarily confirm the remainder devised over; and that might happen in cases wherein he might want the estate in remainder for sale, in order to

(*r*) 7 Taunt. 221.
(*s*) Bro. Abr. "Devise," 235. s. 13. Plowd. 516. 519. Com. Dig. "Administration," (C. 6.) Off. Ex. 236. Perk. sect. 574. 3 P. Will. 12.
(*t*) Plowd. 519. 543. (*u*) 3 Bulst. 122. Bridg. 55. (*x*) 8 Rep. 95.

pay the testator's debts: such an assent would be a *devastavit* in the executor, which might be a grievous hardship to him. If the devise to him be absolute, the same reason does not exist; for he has the value of the whole term, as an equivalent, to indemnify himself against the consequences of the *devastavit*."(*y*)

The rule then may be thus stated; that where a partial interest in a term of years is given to an executor, with a limitation over upon his death; if he enter into possession generally, he will be considered as entering *qua* executor, and not as devisee.(*z*) In *Pannell* v. *Fenn*,(*a*) the general rule is thus laid down: "When a particular interest in a term is given to executors, and the residue to another person, the entry of the former shall not be an election to take it as a legacy, except there be an express declaration of their intent; for otherwise they should be charged for the residue as a *devastavit*, which the law will not enforce; but if the entire term be given to the executors, it would be otherwise, for there is no mischief."

It is not, however, necessary, that an executor-legatee of a term should expressly declare his assent to take as devisee, but his assent may be inferred, by implication, from his dealing with it. The following rule may be laid down upon the subject, "That, if an executor, in his manner of administering the property does any act which shows he has assented to the legacy, that shall be taken as *evidence* of his assent, but if his acts are referrible to his character of executor, they are *not evidence* of an assent to the legacy."(*b*)

If then the executor-devisee demise the term by the description of executor, that act cannot be construed an assent.(*c*) Neither will a demise of the term in *his own name*, without such description, have that effect; because the act is quite consistent with his power and character of executor.(*d*).

So also if such executor, where there are others appointed, solely enter, or in addition demise the term, reserving the rent to himself, executors, &c. still no assent to the devise will be raised by implication: because, as executor, he *alone* had power to demise the term, and consequently to reserve the rent to himself, &c. The act, therefore, is referrible either to his character of executor or legatee; and it is not sufficient, to constitute an implied assent, to show, that the act is *equally* applicable to the title of legatee, as to the character of executor, but it must appear that the act was done rather in the character of legatee, than in that of executor.(*e*)

In *Doe* v. *Hayes*,(*f*) the doctrine upon this subject was maturely considered. In that case the testator gave the interest he had in an estate for an unexpired term of years, to his nephew *Samuel Hayes* for life, with remainder over, appointing *Samuel* and two other persons trustees and executors, with power for *Samuel* during life, and afterwards for the surviving executors and trustees, to demise the lands for twenty-one years. *Samuel* alone entered upon the property at the testator's death, and demised it for fourteen and forty-two years, reserving the rent to himself, his executors, &c. He also made the contract in his own name, and disposed of the estate by

(*y*) 7 Taunt. 321, (*z*) 10 Rep. 47. b. (*a*) Cro. Eliz. 347-8. 2 P. Will. 531.
(*b*) 7 Taunt. 222. (*c*) 1 Leon. 216. (*d*) 7 Taunt. 222.
(*e*) Ibid. (*f*) 7 Taunt. 217.

his will, one of his co-executors being alive. The estate was claimed by the plaintiff's deriving title under the will of the first testator, in opposition to the interest of the defendant, a purchaser from the lessee. The lease could not be supported under the power, and, as a demise by a mere tenant for life, it determined upon his death; but, as a lease by an executor, it might be supported, unless the executor *Samuel* had previously assented to the devise to himself. In that event, the legal interest in the term in remainder after his death vested in the devisees over, which entitled them to recover; since the demise by the executor in the character of legatee, could only continue during his life. And it was decided, first, that the power of leasing was not legally executed; secondly, that the contents of the lease did not supply sufficient evidence, that the demise was made by *Samuel* in the character of devisee for life of the term; thirdly, that *Samuel's* will disposing of the property did not furnish such proof, since the evidence should be of an assent to the legacy at the *time* of making the lease, which a *subsequent* will could not supply; besides there was no decision, that a devise over, by a *tenant for life*, of *that which he could not give*, was evidence of his election to take as devisee.(*g*) And lastly, that the lease was good as a demise by *Samuel* in the character of executor.

From what has been said, it appears that the doctrine of *Perkins*(*h*) upon the subject, followed by the author of the *Touchstone*,(*i*) is not law. It is there laid down, that, if a term be devised to one executor alone, for part of the time, and for the residue of it to a stranger; and that executor alone, after entering generally, occupy the land himself, and his co-executors do not intermeddle with it; there was, as it seemed, a good assent to execute the devise to the person in remainder. An opinion expressly negatived by the Court of *Common Pleas* in the before stated case of *Doe* v. *Hayes*,(*k*) and contrary to the case immediately put in opposition by the learned author of the *Touchstone:* for, says he, if a person bequeathed *goods* to *one* of his executors for *life*, with remainder to a stranger for life, and the executor alone get the goods into his own hands and occupy them alone all his life; it seems that such occupation, without some assent, will not execute the gift in the second legatee. The two cases are in principle the same, and we have seen that such an entry and occupation will not be sufficient evidence of the assent of the executor to his own legacy.

But that such an executor may impliedly show his assent to take as a devisee is equally true. If then a term of years be given by a testator to his widow and executrix, during the minority of his eldest son, to the intent that, with the profits, she bring up his children, and the residue of the term, after the son attained twenty-one, was given to him; the entry of the widow generally, coupled with an application by her of the rents in educating the children, will amount to an assent not only of the devise to herself, but of the residue of the term to the eldest son.(*l*)

So it will be, if an executor-devisee for life of a term for years

(*g*) Contra, where the executor is devisee of the whole interest in a Term. Off. Ex. in margin. (*h*) Sect. 574-5. (*i*) Touchst. 457.
(*k*) 7 Taunt. 217. (*l*) Plowd. 539.

enter upon the lands, explaining the act by a declaration that he claimed the estate as devisee for life.(*k*)

Or by applying the rents to his own *private* uses.(*l*)

Or by payment of a sum of money with which the term was *charged* by the will.(*m*)

For, in all these instances, the acts of executor in relation to the term clearly showed that he was not dealing with it as executor but as devisee.

6. Of presumptive assent to legacies.

It is the duty of executors to assent so soon as all the debts and expenses attending the administration have been satisfied, and there is a sufficient residue to pay all the legacies. If, nevertheless, they refuse to do so, the legatees are entitled to relief in equity. It seems, therefore, that an assent will be presumed in the absence of evidence, when executors die after debts are paid, but before the legacies are satisfied, upon the principle, that the executors acted in conformity with their duty.(*n*)

Suppose then a mortgage term, with the money due upon it, to be specifically bequeathed to *B.* and the debt to have been for many years after the testator's death, continued on the same security; that his executors are dead, all his affairs having been wound up by them, and that *B.* has been in receipt of the interest for several years. Under those circumstances, it is conceived, that *B.* would be presumed to have obtained the proper consent to his legacy, and that he alone would be competent to give a good discharge, and to re-convey the legal estate to the mortgagor, upon discharge of the mortgage.

7. As to conditional assents.

These assents, like those to the marriages of legatees, considered in the last chapter, may, as it would seem, be made dependant upon a *precedent* conditional event connected with the administration of the assets. It may be the duty of the executor to suspend his assent upon a contingency; and there appears to be no more objection to his having the power of so doing, than to his power of consenting conditionally to the marriages of legatees, when his assent is required by the testator.(*o*) If then to an application for a legacy, the executor answer, he will pay it, provided the assets shall appear sufficient to satisfy all demands, after he has clearly ascertained the amounts of debts and credits, or that he will assent and pay the legacy if the balance of an unsettled account between the testator and *B.* shall be found of a particular amount in favour of the estate; it is presumed that these and similar conditional assents will be good *i. e.* there will be no assent until the contingencies happen.

But when the condition is of a nature which does not relate to the circumstances of the estate, and is consequently such as an executor has no authority to impose, it should seem that the assent would be absolute, and the condition rejected, whether the condition were *precedent* or *subsequent*. Thus, if the executor declared his assent to the bequest, provided the legatee went to *York*, and there exe-

(*k*) Plowd. 516. Perk. sect. 574. *Welcden* v. *Elkington*, 3 Dyer, 358. b.
(*l*) 1 Roll. Abr. 619. (*m*) *Young* v. *Holmes*, 1 Stra. 70.
(*n*) See 2 P. Will. 532. (*o*) *Ante*, p. 542.

cuted a particular commission for the executor's personal benefit, it is presumed the assent would be absolute; for the assent implied an admission of assets, and the condition was irrelevant and improper. So also, if the legacy were of goods, and the executor delivered them to the legatee, upon condition to re-deliver them to him at a particular time, the assent would be complete and the condition void.(*p*)

The only question which remains is—

8. Whether an executor can retract his assent after it has been given.

Where assent has been completed by payment or possession of the subject of bequest, retraction is too late. But if assent be not so perfected, and its recal is not attended with injury to a third person, as to a *bonâ fide* purchaser from the legatee on the faith of such assent,(*q*) it seems only reasonable that the executor should have an opportunity to retract it under particular circumstances. Suppose then an executor, honestly intending to do his duty, assent to a legacy upon a reasonable ground for considering that the assets are fully sufficient to answer all demands upon them, but unknown debts are unexpectedly claimed, which occasion a deficiency, and then the executor withdraws his assent, it would be harsh to deny him the privilege. With a little variation of expression, we may apply to such and the like instances the judicious observations of Lord *Eldon* on a similar subject before stated.(*r*) "As a general principle, it would be dangerous to hold, if at a particular time (an executor) upon a conscientious sense of duty, think himself required to assent, which he accordingly gives, but previously to (payment) becomes acquainted with circumstances which ought at first to have operated to make him withhold his consent, that he shall not afterwards alter his mind."

Sect. II. Of the Payment of Legacies.

1. Out of what fund.

It is a general rule, as was noticed in the twelfth chapter,(*s*) that the personal estate is the primary fund for the payment of legacies. When the real estate is merely *charged* with those demands, the personal assets are to be applied in the first place towards their liquidation. And when the real estate is first applicable to discharge the legacies in exoneration of the personal, we have attempted to show in the chapter last referred to.

It may happen that a part of the personalty may be specifically designated by the testator for the payment of a particular legacy; in which case the fund described will be applicable to the discharge of the favoured legacy, in preference to other general legacies, as stated in the fifth chapter, which treats of the abatement of specific legacies.(*t*) But a question may arise—

2. Whether the payments are to be made in sterling money or in currency.

It seems to be settled as a general rule, founded upon the presumed intention, that legacies are to be paid in the money of the country in which the testator is domiciled, and the wills are made. It

(*p*) 1 Leon. 129-130. 4 Reports, 28. b. (*q*) 1 Ch. Ca. 257. 2 Freem. 142.
(*r*) *Ante*, p. 542-3. (*s*) *Ante*, p. 463. (*t*) *Ante*, p. 255.

follows, therefore, that if a man, resident in *Jamaica* or *Ireland*, make his will, leaving legacies generally to persons in *England*, they will be payable in *Jamaica* or *Irish* currency. If such be the rule when legacies are given generally, *a fortiori* it must prevail when aided by the testator's intention, more clearly apparent from his giving some legacies in *sterling* or *lawful money* of *Great Britain*, and others *without* any such description. Consequently, the latter will be payable in the currency of the country where the testator was domiciled. In the case of *Saunders* v. *Drake*,(*u*) Lord *Hardwicke* acknowledged the rule, and said, "If the testator (resident in *Jamaica*) had given all his legacies *generally*, they must have been paid in *Jamaica* money, nor would the legatees living in *England* have made any distinction; for *the residence of the person devising* must decide it." And his predecessor, Lord *Macclesfield*, expressed the same opinion. "If (said he) a man, by will made in *England*, give a legacy of 80*l*. it must be *intended English* money."(*x*)

In *Saunders* v. *Drake*,(*y*) the case before referred to, the testator being domiciled and making his will in *Jamaica*, gave in the first place certain legacies to be paid in sterling money, and immediately afterwards two legacies, without any direction as to their payment in *sterling* money. One of the two latter legacies was claimed in *English currency*. And Lord *Hardwicke* was of opinion, as before stated, that the residence of the person devising was to determine the question as to the legacies given *generally*, and therefore the legatee was to be paid in *Jamaica currency;* but as to the legacies *directed* to be paid in sterling money, it was his Lordship's opinion that they ought to be paid in the currency of *England*, notwithstanding the testator resided in *Jamaica*.

So in *Pierson* v. *Garnet*,(*z*) the Bishop of *Clogher* in *Ireland* gave several legacies *expressly* to be paid in *sterling* or *English* money, and others indeterminate as to the fund. The will being made in *Ireland* the question was, whether the latter legacies should be paid in *sterling* money or *Irish* currency. And the Master of the Rolls determined that they should be discharged in the currency of *Ireland*, upon the authority of the last case, declaring that legacies must be paid in the currency of the country where the will is made.

Also in *Malcolm* v. *Martin*,(*a*) the testator having his domicile in the island of *Antigua*, made his will there, and gave to his sister the interest of 1000*l*. sterling for life, and the capital at her death between the plaintiffs. He then bequeathed to the children of Mrs. *Glass* and to the children of Mrs. *Lyon* (both of them then dead) "the interest of 1500*l*. for life," &c. Whether the latter legacy was to be paid in *Antigua* currency or in sterling money of *England* was the question; and Lord *Alvanley*, M. R. directed the legacy given in sterling money to be paid in sterling money, and that bequeathed generally to be paid in *Antigua* currency.

Such being the rule on this subject in regard to personal bequests, it remains to be considered, whether a charge of legacies upon real estate, or the gift of them in the first instance out of that fund, will make any difference. And,

(*u*) 2 Atk. 466. (*x*) 2 P. Will. 89. (*y*) 2 Atk. 465. 2 Blights Parl. Ca. 91.
(*z*) 2 Bro. C. C. 39. 47. Pre. Ch. 201 *in notis. S. C.* (*a*) 3 Bro. C. C. 50.

First, When the legacies are made charges upon *lands* of a testator situated in a country where he is not domiciled.

It is to be presumed, as before noticed, that a testator, in disposing of his property, intends it to be governed and regulated by the laws of the nation in which he resides, and where the will is made, without regard to the circumstance of the situation of his estates. It follows from this presumption, that if a man domiciled in *England*, but seised of plantations in the *West Indies* or of estates in *Ireland*, charge, by will made in this country, those estates with legacies *generally*, without mentioning whether the sums are to be computed in sterling money or in currency, they will be payable in sterling money of *England*. We accordingly find Lord *Macclesfield* in *Wallis* v. *Brightwell*, stating the doctrine in these words: "If one, by will made in *England*, give a legacy of 80*l*. it must be *intended English* money, and it will be the same thing though *charged* on land in *Ireland*. And for the same reason that a *single* payment of 80*l*. will be taken to be *English* money, so shall an *annual* payment of 80*l*. receive such construction."(*b*) It is true, that in the *ordinary* case of a mere charge upon lands in *Ireland*, &c. the money is payable in *Irish* currency. But charges created by wills and marriage settlements are to be construed by the intention of the parties. Their meaning, as to the money being payable in *English* or *Irish* currency, is to be collected from words immediately applicable to the point, from the context of the instrument, and from each and every part of it.(*c*) It appears from the cases to be the *primâ facie* presumption, that money charged upon lands in *Ireland*, by the will of a person domiciled in *England*, and made there, was intended to be paid in *English* currency.

Second, When the provision is given as a rent-charge out of lands, in *Ireland*, the will being made and the testator domiciled in *England*.

If, as we have seen, the rule of decision in these cases is founded upon intention, and it is to be presumed *primâ facie* that the testator intended the measure of his bounty to be regulated by the currency of the country where he was domiciled and his will made, without regard to the currency of the place where his estates were situated; it seems difficult, upon principle, to admit of the presumption being repelled, from the mere circumstance of the real estate being made the primary or sole fund for satisfying the provision. It is not any objection, that by the law of the country where the lands lie, a tender of the nominal amount in currency will be a sufficient payment, though less than the real amount in value in the currency of the place where the will was made. For if the testator, in fixing the *quantum* of charge, is to be considered to have done so *primâ facie* in *English* currency, and his power is indisputable, then a tender of less in value than the sum mentioned in the will, in the currency of the country where the lands are situated, cannot be a satisfaction of the demand.

In *Wallis* v. *Brightwell*,(*d*) the testator lived with his wife in *England*, and by will made in *England* he devised his lands in *Ireland*

(*b*) 2 P. Will. 89. and see *Phipps* v. Earl of *Anglesea*, stated *infra*, p. 578.
(*c*) 2 Bligh. Parl. Ca. 88. (*d*) 2 P. Will. 88. 2 Bligh. 91.

to a trustee for five hundred years, "in trust out of the rents and profits to pay 80*l. a year* to his wife for life." It was argued, that no place being appointed for payment, and the fund in *Ireland*, the annuity ought to be paid in *Irish* currency or subject to the charge of remittance. But Lord *Macclesfield* decided, that the will being made in *England* where the parties resided, and the provision being for a wife, it should be *intended* that such provision was estimated in the money of the country where the will was made.

The last case is a direct authority, that where a testator residing in *England*, by will made there, devises his *Irish* estates in trust to pay *out of the rents* an annuity to an individual also residing in *England*, the annuity is to be paid in *English*, not in *Irish* currency

It is true that in *Phipps* v. *Anglesea*, below stated, it may be inferred to have been the opinion of the Court that there is a difference between a *gross sum* charged upon lands in *Ireland* and a rent granted out of them, *viz.* that the latter is payable *in Ireland*, and in *Irish* currency, and the former not so. But it must be remarked, that the question as to rent being so payable was not the point in question in that cause, and the intimation of opinion there given amounts only to a mere *dictum* of the Court, to which much importance is not to be attached.(*e*)

If such be the rule of construction, where a yearly sum is directed to be paid out of the rents of an estate abroad *generally*, *a fortiori* the rule might be the same when the instrument expresses the annuity to be "lawful money of *Great Britain*."

Thus in the case of the Marchioness of *Lansdowne* and the Earl of *Lansdowne*, on appeal from the Court of *Chancery* in *Ireland*,(*f*) the greater part of the *Lansdowne* family estates situated partly in *England* and partly in *Ireland*, were in the year 1794, settled by the then Earl and his eldest son the Earl of *Wycome*, and a life estate therein limited to the use of *his* son after the death of his father, with a power to jointure any woman he might marry with "any annual sum of money or yearly *rent-charge* tax-free and without deduction, to be issuing out of and chargeable upon all or any part of the manors, &c. situate in the said kingdom of *Ireland*, not exceeding 3000*l.* of *lawful money of Great Britain*." The son, by deed executed in *England*, exercised his power in appointing to the appellant a yearly rent charge "of 3000*l.* of lawful money of *Great Britain*, to be issuing out of and charged upon the same manors," &c. All the parties resided and were domiciled in *England* when the power was executed, and the appellant claimed 3000*l.* a year in *English* currency and payment of it *in England*. The House of Lords acceded to the first of those two demands, as by the power and the appointment the money was directed to be paid in lawful money of *Great Britain*; but it refused the second, because there was no indication of an intent that the rent-charge was to be paid in *England*.

3. The last case is an authority, that where lands in one part of the dominions of these kingdoms are subjected by the will or appointment of a person domiciled in another, to the payment of a sum of money in the currency of the latter, the exchange upon remit-

(*e*) See the case and observations *infra*. (*f*) 2 Bligh. Parl. Ca. 60.

tance is to be borne by the legatee, because the owner of the estate is under no obligation to tender the money at any place except upon the lands.(*g*) But it is equally clear, that if from the circumstances of the case it can be inferred that the money was not only intended to be paid in *English* currency, but also *in England*, the person or estate charged with the obligation must bear the expense of remittance.

Accordingly in *Willis* v. *Brightwell*,(*h*) Lord *Macclesfield* inferred, from the circumstance of the testator having made leases of his *Irish* estate, reserving just so much rent *to be paid in London*, free from taxes, as would be sufficient to discharge all the annuities to which they were liable, that he meant his widow's annuity of 80*l.* payable out of those rents, to be remitted to her *in England*, without deduction of the exchange.

Upon a similar principle, the decision in *Phipps* v. the Earl of *Anglesea*(*i*) was founded. It appeared that by a settlement made upon the marriage of the Earl with a daughter of the countess of *Dorchester*, a term of five hundred years was created in his *Irish* estates, in trust to raise 12,000*l.* for the portions of daughters; but it seems from the argument, that the settlement provided a rent-charge out of the same estates for the wife's jointure, with an express direction that it should be *paid in London*, without abatement or deduction for the exchange; whereas in the declaration of the trust of the term for raising the portions, there was no such direction. The parties to the settlement resided in *England*, and in a suit by the daughter (sole issue of the marriage) and her husband to have the portion, with the rest of her fortune, settled, it was the first point in the cause, whether the 12,000*l.* charged by means of the term upon the lands in *Ireland* should be paid in *England*, without abatement or deduction for the exchange from *Ireland* to *England*. And Lord *Parker*, C. was of opinion, that the portion ought to be paid *where* the contract was made and the parties resided, and not in *Ireland* where the lands lay which were charged with the payment. For that it was a *sum in gross*, and not a rent issuing out of land. And his Lordship remarked it was certainly the *intention* of the parties that the portion should be paid in *England*, and not to send the young lady to *Ireland* to get her portion.

Lord *Eldon* made the following remarks upon the last case: "It is true that in *Phipps* v. Lord *Anglesea*, the distinction is taken in the judgment, which was urged in this case at the bar,(*k*) that there it was a *sum in gross*, and *not a rent* issuing out of land; but that seems to be in answer to that part of the argument in that case, which is founded on the different expressions of the settlement as to the *jointure* of the wife and the portions of the daughters. As to the former, which is by name a rent-charge it is provided that it shall be *paid in London, without deduction for the exchange;* whereas in the declaration of the trust of the term created for raising the portions, these words are omitted, and it is only said in trust

(*g*) 2 Bligh. Parl. Ca. 95. (*h*) *Ante*, p 576-7.
(*i*) 5 Vin. Abr. 209. pl. 8. 8vo. ed. 1 P. Will. 696. *S. C.* 2 Bligh. Par. Ca. 89.
(*k*) *Lansdowne* v. *Lansdowne*, *supra*, p. 577.

to raise 12,000*l.* Upon this point of the argument the Court seems to have been of opinion, that in the case of a rent-charge, the addition of such words *might* be necessary, but that the question as to a sum in gross (which the portion in that case was considered to be) was to be decided on *circumstances*, and accordingly the *decision rests* in *substance* upon the *domicile*, and the presumed intention of parties resident in *England*, that a portion secured for a daughter should be *paid* to her *in England*.(*l*)

Where the testator is domiciled abroad, and by will, made there, gives legacies in the current coin of the place to persons residing in this country, the legatees are entitled to be paid in *England* the value at which that coin was estimated where the testator resided, at the end of the year next after his death. Consequently the exchange upon the remittance will fall upon his estate.

This was determined in the case of *Cockerell* v. *Barber*,(*m*) where Mr. *Barber*, domiciled in *India* and residing at *Calcutta*, gave, amongst others, a legacy of 30,000*l. sicca rupees* to Mr. *Cockerell* resident in this country. What was the sum in pounds to be paid in *England*? was the question. And Lord *Eldon* thus expressed himself: "in all the cases reported on the wills of persons in *Ireland* or *Jamaica* and dying there, and *vice versa* in this country, some legacies being expressed in money-sterling and others in sums without reference to the nature of the coin in which they are to be paid; the legacies are directed here to be computed according to the value of the currency of the country to which the testator belonged, or where the property was situated. And I apprehend no more was done in such cases, than to ascertain the value of so many pounds in the current coin of the country, and the payment of that amount out of the funds in Court. On the other hand, I do not believe the Court has ever said it would not look at the value of the current coin, but would take it as bullion. At the time of *Wood's* half-pence in *Ireland*, whatever was their worth, payment in *England* must have been according to their nominal current value, not the actual value. So, whatever was the current value of the *rupee* at the *time* when this legacy ought to be paid, is the *ratio* according to which payment must be made here in pounds sterling. If twelve of *Wood's* half-pence were worth sixpence, in this Court sixpence must have been the sum paid; and in a payment in this Court the *cost* of *remittance* has nothing to do with it; so if the value of 30,000*l.* rupees at the time the payment ought to have been made in *India*, was 10,000*l.* that is the sum to be paid here, without any consideration as to the expense of remittance." His Lordship declared, that this and the other legacies were to be paid according to the current value of the *sicca rupee* in *Calcutta*. We shall proceed to consider in the next place—

4. At *what time* legacies are to be paid. And first,

A.—When the bequest is of a *gross sum* of money.

Where legacies are given generally to persons under no disability to receive them, the payments ought to be made at the end of a year next after the testator's decease. The executor is not obliged to

(*l*) 2 Bligh. 90. also. p. 95.
(*m*) 16 Ves. 461. 465. and see *Cash* v. *Kennion*, 11 Ves. 314.

pay them sooner, although the testator may have directed them to be discharged within six months after his death; because the law allows the executor one year(*n*) from the demise of the testator to ascertain and settle his testator's affairs; and it presumes that at the expiration of that period, and not before, all debts, &c. have been satisfied, and the executor to be then able properly to apply the residue among the legatees, according to their several rights and interests. But if the state of the testator's circumstances be such, as to enable the executors to discharge legacies at an earlier period, they have authority to do so; for the legacies are due at the death of the testator, and the year allowed the executors previous to compulsory payment is merely arrangement for their convenience and safety.(*o*) And when legacies are given to infants to be paid at twenty-one, with or without a limitation over to the survivors upon the death of any of them dying under that age, each child will be entitled to receive his legacy or proportion upon attaining that age, as was shown in the second chapter.(*p*) And it seems that if the money be in the Court of Chancery, it will permit a transfer to a person duly authorized by him to accept it.(*q*)

When a legacy given *generally*, so as to fall within the before mentioned rule, is subject to a limitation over upon a subsequent event; the devesting contingency will not prevent the legatee from receiving his legacy, at the end of the year after the testator's death; and he is under no obligation to give *security* for repayment of the money, in case the event shall happen. The principle seems to be that, as the testator has entrusted him with the money without requiring a security, no person has authority to require it.(*r*)

In *Griffiths* v. *Smith*,(*s*) the plaintiff was entitled, under the will of his uncle, to an estate tail in remainder, expectant upon the determination of a precedent estate tail limited upon an estate for life, in his uncle's real estates. By the same will a legacy of 2000*l.* was given to the plaintiff upon the death of the testator's widow, to be paid at twenty-one; *provided* if he *at any time* became seised of the testator's real estate, the legacy should go over to other persons. The plaintiff attained his age of twenty-one after the death of the testator, and the real estate not having come to him, he claimed immediate payment of the 2000*l.* And Lord *Rosslyn* ordered the money to be paid to the plaintiff, and no security appears to have been required from him.

Upon the authority of the last case, Sir *W. Grant* determined the case of *Fawkes* v. *Gray*.(*t*) There Mrs. *Millegan* gave a legacy of 1000*l.* to *Mary Fawkes*, but on condition that if she succeeded to a particular estate by the determination of an estate tail in *Marian Paterson*, the legacy was to be void. Notwithstanding *Marian* was living, *Mary Fawkes* insisted that she was entitled to receive the money for payment of which she commenced the suit. The legacy had been invested, and Sir *W. Grant* directed the stock in which it stood, to be transferred to *Mary* and *without security*.

(*n*) See *Benson* v. *Maude*, 6 Mad. 15. (*o*) *Ante*, p. 376.
(*p*) *Ante*, Ch. II. sect. 2 sub-div. 4.
(*q*) *Hill* v. *Chapman*, 11 Ves. 239. and see *Carr* v. *Eastabrook*, 2 Cox. 390.
(*r*) Vide *ante*, Chap. X. sec. 5. p. 404-5. (*s*) 1 Ves. jun. 97. (*t*) 18 Ves. 131.

But it seems, where a legacy is given upon a condition to do or abstain from a certain act, and the time of payment is arrived, a court of equity will require security from the legatee for the observance of the condition. Thus, in *Colston* v. *Morris*, a legacy was given to a father, upon condition that he did not interfere with the education of his daughter; on a bill by the father for the legacy, the Court required from him security to that effect, to be approved by the *Master*, and directed the costs of the proceedings to be paid out of the legacy.(*u*)

When, however, there are outstanding liabilities that may create demands upon the assets of the testator, but which, at the time of the legatees becoming entitled to call for payment of their legacies, depend upon contingencies that may or may never ripen those liabilities into debts or duties, a court of Equity will not speculate upon the decisions of a court of Law, and oblige the executor to part with the fund either to *particular* or *residuary* legatees, without a sufficient security for his indemnity against *legal* consequences. The reason seems to be, that, as the Court cannot protect the executor against the claims of the persons, who may eventually become creditors of the testator, it would be unjust to compel a distribution when it would place the executor in jeopardy. It results from these remarks, that if, at the time before mentioned, a bond of the testator be outstanding, with a condition which may be broken; or he have entered into covenants, that may render his estate liable in damages; in such and the like instances, the executor may and ought to insist upon an ample indemnity, before he pay the legacies or part with the residue.

This point seems to have been fully considered in *Simmons* v. *Bolland*.(*x*) In that case, the testator *Simmons* was a lessee for years of a farm under the mayor and commonalty of *Canterbury*, at a certain rent; and under *covenants* to pay it, and for repairs, &c. It was provided that on non-performance of all or any of those covenants, the lease should be void, and a right of entry was reserved to the lessors. *Simmons* devised this farm with his real and personal estates to the defendant, and another person, (who was dead,) whom he named executors in trust to sell; and after discharging debts and legacies, to invest the proceeds in their names upon certain trusts; subject to which, he gave the entire residue to the plaintiff at his age of twenty-five. The executors having discharged all debts and legacies, without resorting to the farm and other real estates, delivered possession of them to the plaintiff, who had attained the above age. There was also a personal residue which they transferred to him, with the exception of so much as the defendant the surviving trustee, thought proper to retain as a security against any claim that might be made upon him, as devisee in trust, and executor of the testator-lessee for rent due, or to accrue, or in respect of the present or any future breach or non-performance of any of the covenants. The defendant admitted that there were no subsisting breaches of covenant, and no rent in arrear. Under those circumstances, the plaintiff claimed that part of the residue, which was retained by the

(*u*) 6 Mad. 89. (*x*) 3 Mer. 547.

defendant, insisting that, as there was *no actual* demand upon the fund, the defendant would be justified at law in disposing of the whole, and consequently ought not to retain any part of it from him; and a variety of cases and *dicta* were cited on both sides.(*y*) However the relief sought in equity depended upon the *legal* question; whether an executor can safely make payment of legacies, or deliver over a residue, while there is an outstanding covenant of his testator which had not been and never might be broken. Sir *W. Grant*, after noticing the case of *Ecles* v. *Lambert* below referred to, stated another of *Nector* v. *Gennet*,(*z*) where the same question arose, although in a different shape. His Honour thus detailed the circumstances: A legatee sued in the Ecclesiastical Court for his legacy. The executor pleaded that the testator, who was keeper of a prison, was bound in an obligation to the sheriff (to an amount exceeding the entire value of the property) for the safe keeping of the prisoners committed to his charge; which obligation had become forfeited, in consequence of a judgment against the sheriffs in an action for an escape; and the executors had therefore nothing in their hands to answer the demand. The plea was disallowed; upon which a prohibition was sued, and, it being demurred to, the defendant prayed a consultation. Upon this, the principal question was, whether the escape was such, that the sheriff was suable in respect of it? for, if not, the bond was not forfeited; and if the bond was not forfeited, then it was said to be clear that the legacy should be first paid, and to this purpose it was argued, that by the Civil law, the legatory must enter into a bond to make restitution, if the obligation should be afterwards recovered, so there was no inconvenience to any. To which the whole Court agreed; and determined that it was no plea unless the obligation were forfeited. *Coke* said, "the difference is, when the obligation is for the payment of a less sum at a *day to come*, it shall be a good plea against the legatee before the day, for it is a duty *maintenant*, which is in the condition (as 9 E. 4. 12.) But otherwise it is where a statute or obligation is for the *performance of covenants*, or to do *a collateral thing*. There, until it be forfeited, it is not any plea against a legatee; for peradventure it shall never be forfeited, and may lie, *in perpetuum*, and so no will should be performed." The majority of the Judges being of opinion, that there was no forfeiture, a consultation was awarded, the effect of which, as far as it regarded the question before his Honour, was to leave the Spiritual Court to proceed according to their own established course, *viz.* to compel the legatee to give *security* to refund the legacy, in case of the executors becoming afterwards liable to be sued upon the bond. The Master of the Rolls, after noticing Lord *Hardwicke's* opinion in *Hawkins* v. *Day*,(*a*) that an unbroken covenant rendered it unjustifiable for an executor to pay a legacy, concluded with observing, that, from the state of the authorities, it would be too much for him to order the executor to transfer and pay, without security in case of judgment being recovered at *law* against him for any *future* breach of the covenant; but upon such

(*y*) *Harrison's* case 5 Rep. 28. b. *Philips* v. *Echard*, Cro. Jac. 8. 35. *Hawkins* v. *Day*, Amb. 160. 162. and *Ecles* v. *Lambert*, Aleyn. 38. Styles 37. 54. 73.

(*z*) Cro. Eliz. 466.

(*a*) Amb. 160.

security being given as settled by the Master, his Honour directed the funds to be made over to the plaintiff.

Security is only required from a legatee, where there is danger of his wasting the property, and his inability to replace it: so that, if personal chattels be devised to *A.* for life, remainder to *B.*, *A.* will be entitled to the possession of the articles, upon signing and delivering to the executor an inventory of them, admitting their receipt, and that they are to go to *B.* after his *A.'s* decease, as mentioned in the fourth chapter.(*b*)

Courts of equity have established the following distinction between *legatees* and their *representatives* in relation to the time of paying the legacies, *viz.* that if a legacy be given to *A.* to be paid at twenty-one, and the intermediate interest is not given, and *A.* die before that period, his representative must wait for the money until *A.* if living, would have attained twenty-one; but if the legacy be limited over to *B.* on the event of *A.* dying under that age, and *A.* die before that time, *B.* will be entitled to call for it immediately upon the death of *A.* The reasons are these: the representative of *A.* can claim no otherwise than *A.* could have done, if living. As *A.* therefore had no power to call for his legacy before he attained twenty-one, neither can his representative insist upon payment of it sooner. But in the other case, *B.*, the legatee over, does not derive his title through *A.* but under the testator's will, by a distinct and substantive gift, upon the contingency of *A.* dying under twenty-one; so that whenever that event happens, the time of payment not being otherwise postponed, *B.* becomes immediately entitled to receive the legacy. The following cases will illustrate the above remarks:

In *Chester* v. *Painter*,(*c*) the testator gave a sum of money to *A.* *B.* to be paid at twenty-one, and directed a *part* of the intermediate interest to be applied for his benefit. *A. B.* died a minor, and his *executors* demanded *immediate* payment of the legacy. But it was decreed, that the executors should wait for the legacy until such time as the legatee, had he lived, would have attained twenty-one, it being unreasonable that his executors, who stood in his place, should be in a better situation than the person whom they represented would have been, if he had been in existence.

The last case was followed by that of *Roden* v. *Smith*,(*d*) in which the testator gave to his grandchild a legacy of 500*l.* to be paid at twenty-one, with an allowance of 11*l.* a year for maintenance till the age of four years, and 16*l.* *per annum* afterwards to twenty-one. The legatee died under age, and upon the claim of its administrator to *immediate* payment, notwithstanding the intestate would, if living, have been then under twenty-one, it was held by the Court of Delegates that the administrator claiming under the infant could not be in a better condition than the infant himself, and therefore he was not entitled to receive the legacy, until such time as the infant would have attained twenty-one.

But the principle of these determinations does not apply to cases

(*b*) *Ante*, p. 231. (*c*) 2 P. Will. 336. also *Crickett* v. *Dolby*, 3 Ves. 15, stated *infra*. (*d*) Amb. 588.

where the legacy is limited over to a person, in the event of the legatees dying under twenty-one.

Thus in *Laundy* v. *Williams*,(*d*) Mr. *Laundy* having several children, bequeathed to his sons, *Samuel*, *William*, and *Edward*, and to his daughter *Ann Laundy*, legacies to be paid at their respective ages of twenty-one. But if any of them died during minority, their legacies were to be paid to the survivors. *Samuel* and *Ann* attained twenty-one, and received their portions. *William* died very young, and the two former claimed *immediate* payment of two-thirds of his legacy, although if he were living he could not be entitled to receive the money, as being under twenty-one. The claim was resisted, on the ground that the legatees over were not entitled to receive the money sooner than the original legatee would have been, if he had been alive; and such was the first impression of Lord *King*. But upon the distinction before mentioned between the representatives of legatees and legatees over, being stated to him by the *Solicitor General*, and established by reference to authority,(*e*) his Lordship changed his opinion, and ordered two-thirds of *William's* legacy to be paid to the plaintiffs.

It has been determined, that legacies charged upon or eventually payable out of *real* estate are to be considered exceptions to this doctrine. The case alluded to is *Feltham* v. *Feltham*,(*f*) in which the testator, having several daughters, charged his real estates with the payment of their portions, *viz.* 1000*l.* to each daughter at her age of twenty-two, or marriage; but if any of them died before her portion became payable, her share was to go to the survivors. One of the daughters having died before twenty-two or marriage, and another of them having attained that age, it was insisted, that as any particular time was not appointed for paying the portion which had accrued by survivorship it ought to be paid *immediately*. But it was decided by Lords Commissioners *Jekyll* and *Gilbert*, that the accruing or additional portion was not payable before such time as the daughter to whom it was *originally* given, would have attained twenty-two; and for the following reasons; that a contrary determination might be injurious to the *heir*, as also against the intention of the testator, who might have computed within what period the portions could be *raised* with the least inconvenience to his successor.

Another exception to this rule must be made, in instances where none of the legatees take vested interests, but the original legacies are made to depend upon the happening of precedent contingent events, with a limitation over to survivors generally, upon the death of any of the original legatees before the contingencies take place. For in those instances it is presumed to have been the testator's intention to subject the accruing shares or legacies to the same contingencies as the original. So that if legacies be given to two or more persons upon the same contingency, with benefit of survivorship in event of the death of any of them before the time of payment, the surviving legatees cannot demand payment of the legacies or shares accruing to them by survivorship sooner than they

(*d*) 2 P. Will. 478. (*e*) *Papworth* v. *Moore*, 2 Vern. 283. (*f*) 2 P. Will. 271.

would be entitled to call for the discharge of their own original shares.

This was so decided in the case of *Moore* v. *Godfrey*.(*g*) Sir *W. Coventry* bequeathed 1500*l.* to his three co-heiresses to be paid at their respective *marriages*, as well principal as interest; and if any of them died unmarried her legacy was to go to the survivors. The plaintiff (one of the daughters) married, and received her share. The second died unmarried. And whether the 500*l.* which accrued to the plaintiff and defendant upon the death of the unmarried sister, was subject to the condition of marrying, was the question, as the defendant remained single. And Lord *Cowper*, C. was of opinion, that the condition extended to the whole, as well to what accrued by survivorship as to the original devise.

An exception must be also noticed to the rule, in regard to the *representatives* of legatees waiting for payment of the legacies, until the times arrive when the legatees themselves, if living, would be entitled to receive the money. For where legacies are made payable at twenty-one, if *interest* be given during minority, and the legatees die under age, then, since interest is considered a recompence for the delay in payment of the principal, which is merely postponed on account of the ages of the legatees, their executors or administrators will not be obliged to wait for the money, until the legatees would have attained twenty-one.

In *Cloberry* v. *Lampen*,(*h*) *A.* bequeathed to *B.* 500*l.* when *B.* attained the age of twenty-one or married, which ever first happened, to be paid with *interest*. *B.* survived *A.* but died during infancy, and unmarried. And immediate payment of the legacy was ordered to the personal representatives of *B.* because interest was given.

This principle was assented to by Lord *Thurlow* in *Green* v. *Pigot*,(*i*) who thus states it; "If a legacy be payable at twenty-one, and the child die, his executor cannot claim till the time when the child would have arrived at twenty-one, *if* the legacy does not bear interest; but if it be *with interest* he may claim immediately. If it bear a *less* interest than the *utmost use*, the executor has a right to the money, *paying the modified interest*." And in

Crickett v. *Dolby*,(*k*) Lord *Alvanley* expressed himself to the following effect: "Where a legacy is ordered to be paid at the age of twenty-one, and the legatee dies before the time, shall the executor wait till the legatee would have been twenty-one, or have it immediately? This depends upon the question, whether *interest* be payable or not? If interest be given, the executor shall have the legacy immediately, otherwise he must wait. It is admitted that if the legatee had died, her executor could not have the legacy until she (had she lived) would have attained twenty-one. There never could have been such an absurdity as the notion, that you must wait till that time, and then have the subject with the interest."

Supposing then with his Lordship, that a legacy to *B.* payable at the age of thirty, with a gift of interest in the meantime, will entitle *B.* to immediate payment of the principal, yet, if instead of interest

(*g*) 2 Vern 620. ed. by Raithby.
(*h*) 2 Freem. 24.
(*i*) 1 Bro. C. C. 105. stated *infra*.
(*k*) 3 Ves. 13.

a mere discretionary power be given to the executors to advance the money at an earlier period, it will not accelerate the time of payment, unless the discretion be exercised, either by the executors or a court of equity. This will be more clearly understood from the following case:

In *Lewis* v. *Lewis*,(*l*) 3333*l*. three *per cent* annuities were bequeathed to trustees, to apply the dividends towards the maintenance and education of the plaintiff until he attained twenty-one, and to pay him from that time the whole of the dividends for *life*, with an authority to the trustees to apply 600*l*. (part of the annuities) at any time before the plaintiff attained twenty-six, for his advancement in the world or other his occasions as they (the trustees) or the survivor of them should think proper. And the testator gave the 600*l*. to the plaintiff at his age of twenty-six. The plaintiff having attained twenty-one, claimed immediate payment of the 600*l*. But Lord *Thurlow* determined against the demand, observing, that the case was not one of a gift by the testator, but a power to others to give, which seemed be confined to the answering of some particular purposes. That the proper question was, whether the present circumstances and situation of the plaintiff were such as to meet the view of the testator in giving the legacy? To ascertain which fact it was referred to a Master to inquire, whether the situation of the plaintiff required any and what part of the money to be advanced before his age of twenty-six.

Yet a variety of cases may occur of legacies given to or in trust for individuals absolutely and beneficially, but with a direction for the application or enjoyment of the money in a particular manner; as for example, to purchase annuities for the legatees, or to place them out apprentices or to enable them to take holy orders; in which the legatees will be entitled to receive the capitals immediately upon the death of the testator, or at the expiration of a year next afterwards, regardless of the particular modes directed for the enjoyment or application of the property, as has been shown in the seventh section of the tenth chapter.(*m*)

When there is a substitution of legacies, or an *addition* to them, and no times are appointed for payment of the substituted or additional bequests, nor any funds assigned out of which they are to be satisfied, it appears to be settled that those legacies are to be paid out of the same property at the same periods, and upon the same terms as the legacies, in lieu of or in addition to which they are given. In illustration, if *A*. bequeath to *B*. 1000*l*. charged upon lands, and payable at twenty-one or marriage, and he afterwards by a codicil gives to *B*. the further sum of 200*l*. in *addition* to what he gave *B*. by his will; or suppose him to *revoke* the first legacy, and to substitute a *less* in its place, without directing the time when, or the funds out of which the additional or substituted legacies are to be discharged; those latter legacies will be payable at the same periods and out of the same property as the legacy of 1000*l*. first given.

In *Leacroft* v. *Maynard*,(*n*) the testator directed his legacies to

(*l*) 1 Cox, 162. and see *Robinson* v. *Cleator*, 15 Ves. 526.
(*m*) *Vid. ante*, from p. 425 to 431. (*n*) 1 Ves. jun. 279. 3 Bro. C. C. 233. *S. C.*

be paid out of his real estate. Some of them were given to charities which were ineffectual by the operation of the statute of Mortmain; but the testator, by a codicil, revoked those bequests, as also a legacy given to one of his trustees, which he bequeathed to another, whom he substituted in his place; and he gave smaller legacies to the charities "instead" of those mentioned in the will. It was contended for the charities, that, the gift by codicil of the legacies being *general*, they were payable out of the personalty; and that such was the testator's intention might be presumed from the supposition of his subsequent information of the invalidity of the legacies he had given in his will, which was the reason of their being revoked, and for the gift of smaller, by the codicil generally. But Lord *Thurlow* was of opinion, that the codicil only meant to alter the *quantum* of the legacies in some cases, and the objects of them in others; but *not the fund* out of which they were directed to be paid by the *will;* and that therefore the charity-legacies were void, as payable out of real estate.(*o*)

So in *Crowder* v. *Clowes*,(*p*) a term of years was created by the testator for the payment of his debts and legacies, and he gave to his niece 1000*l.* payable at his death in the event of her being then married; but if not, she was to receive the interest for life, or until her marriage; but, if she died unmarried, the legacy was to lapse for the benefit of the person entitled to his real property. By a codicil the testator gave his niece 200*l. in addition* to what he had given to her by the will. And the Master of the Rolls determined, upon the authority of the last case, that the additional legacy should be paid out of the same fund, and be liable to the *same conditions*, as the original bequest of 1000*l.*

By the marriage settlement in *Long* v. *Long*,(*q*) the portions provided for younger children were made payable at twenty-one or marriage, with immediate interest for maintenance at 2*l. per cent.* The father by will increased the fortune of each child, directing the additional sums to be paid at the same times and ages as the portions by settlement, but said nothing as to *interest*. And it was determined, that the same rate of interest was payable on the additional portions, as upon the original.

Consistently with these authorities, Sir *W. Grant* decided the recent case of *Cooper* v. *Day*,(*r*) in which the testator gave to his widow 800*l.* payable within three months from his death, and free from legacy duty. He also gave 4000*l.* to trustees, payable to them within the same period, free from legacy duty, in trust for his two daughters, to be paid at twenty-one, with intermediate interest for their maintenance. By a codicil, the testator bequeathed to his wife, an additional sum of 200*l.* free from legacy duty. He also revoked the legacy of 4000*l.* and in subsitution gave in trust for his daughters 5000*l.* "upon the trusts, and to and for the same intents and purpose, and under and subject to the same powers, provisoes, and limitations, as expressed in his will concerning the legacy of 4000*l.*" By a second codicil, the testator revoked the gift of 5000*l.*

(*o*) See also *Chatteris* v. *Young*, 6 Mad 31.
(*p*) 2 Ves. jun. 449. and see *Wordsworth* v. *Younger*, 3 Ves. 73.
(*q*) 3 Ves. 286. in a note. (*r*) 3 Mer. 154. *infra.*

and gave in its place 6000*l.* to the same trustrees, upon the trusts, &c.; following the words in the first codicil. The only question was, whether the legacy of 6000*l.* was to be paid free of the legacy duty? And Sir *W. Grant* declared, upon the authority of the before stated cases of *Leacroft* v. *Maynard* and *Crowder* v. *Clowes*, that the *substituted* legacy of 6000*l.* was to be taken as exempted from the legacy duty, in like manner with the *original* legacy, in the place of which it was given.(*s*)

When the assets of testators are placed under the administration of a Court of Equity, it will not, in general, order any part of them to be applied in satisfaction of one or more legacies, until it appears, from a Master's report, that the debts, &c. have been paid, and there is a sufficient residue to discharge the legacies. Yet this practice is not without exceptions. When justice and convenience require a departure from the general rule, they will prevail. Suppose then a case to arise, where the assets are admitted to be amply sufficient to satisfy all demands upon them, it seems that the Court, with the consent of all parties interested in the application, will direct the immediate payment of the whole or proportions of the legacies, as the urgency of the case and circumstances may require.

In *Pearce* v. *Baron*,(*t*) application was made to the Court for payment of part of a legacy, without prejudice to the question out of what fund it was to be discharged. The bill was filed by trustees to have the accounts taken, &c. and the application was made upon the ground of there being a clear surplus, and with the *consent* of all competent parties. A case of *Coffin* v. *Cooper*(*v*) was cited, and acknowledged by the Court to be in point. Lord *Erskine*, C. granted the application, observing, that such an order can never be made, except where there is a *clear obvious surplus, admitted* by others who are interested to object; when it is a measuring cast, that will not do. The principle, upon which the Court acts is, that the persons so interested to object, will not assent, if it involved them in all the responsibility, which would arise where creditors are outstanding, and the fund is scanty.

B.—Bequests of annuities.

With respect to the period, when the *first* payment of an annuity is to be made, when the time is not appointed by the testator, the following distinction is presumed to exist. If the bequest be merely in the form of an annuity, as a gift to *B.* "of an annuity of 100*l.* for life," the first payment will be due at the end of the year after the testator's death. But if the disposition be of a sum of money, and the interest of it is given as an annuity to *B.* for life, the first payment will not accrue before the expiration of the *second* year after the death of the testator. In the former instance, the testator is supposed to mean that the annuity should commence from his decease. In the latter, the annuity being given in the form of interest, upon a gross sum of money, to be taken out of the assets as any other legacy (and which we have seen, does not begin to carry interest until the end of the year after his decease,) cannot be payable sooner than the fund produces the means for that purpose. This dis-

(*s*) *Chatteris* v. *Young*, 6 Mad. 30. (*t*) 12 Ves. 459.
(*v*) In chancery 26 March 1806, 12 Ves. 460.

tinction was stated by Lord *Eldon* in the case below referred to, and seems to be founded upon principle; yet it does not appear to have been sanctioned by express decision.(*u*)

But questions of this kind can only arise, where testators omit to settle the period when the first payments of annuities are to be made. If then, a testator direct payment of an annuity (however given,) to be made at the expiration of the first quarter, or half year, after his death, it will be due at that time, although not in fact payable by the executor until the end of the year.(*x*)

C.—It may here be proper to add a few observations on the subject of apportionment.

When an annuity, or the dividends of stock, are given to one for life, with remainder over; as between the tenant for life and persons in remainder, apportionment is not in general allowed.

Thus, an annuity or the dividends of stock, being in the nature of an annuity, was given to one for life, payable half yearly; the first payment to be made on the second quarter-day which should happen after the death of the testator; the testator died on the 19th of *November* 1756; and the daughter on the 19th of *January* 1803: her representative claimed the dividends due on the 5th of *January* 1803: and it was held by Sir *William Grant*, that the daughter was only entitled up to *Michaelmas*, being the day of the last half yearly payment previous to her death.(*y*)

The rule is otherwise, where the annuity is given by a parent to a child, in the nature of *maintenance*.

Thus; a mother directed her daughter *Martha* to pay to the testatrix's daughter *Mary*, 30*l.* yearly, while she continued sole, by 15*l.* each *May* day and *All Saints* day. *Mary* married before a half year's payment became due; but Lord *Hardwicke* directed the annuity to be apportioned, and paid up to the day of the marriage.(*z*) His Lordship considered the principal case as falling within the reason of *Hay* v. *Palmer*.(*a*)

We shall next consider,

5. To whom legacies are to be paid.

It has been observed, that when the fund is in Court, and the legatee entitled to receive it, the Court of Chancery will order payment to a person lawfully authorized by him.(*b*)

A.—But when the legatee is an infant, and he would be entitled to receive his legacy, if he were of age, payment to him, or to his father on his account, cannot be supported. The child, upon attaining twenty-one, may recover it from the executor. This however was not always so; for it appears from the case of *Holloway* v. *Collins*,(*c*) that in early times payment to the father of his infant child's legacy was good; but since the case of *Dagley* v. *Tolferry*, reported in the book referred to in the last note, and after stated, it has become the settled rule of Courts of Equity, that such a payment is illegal. If, indeed, the child were of age, payment to the

(*u*) See Lord *Eldon's* observations in *Gibson* v. *Bott*, 7 Ves. 96. and ibid. 97. stated *infra*, Chap. XX. s. 12.

(*x*) *Storer* v. *Prestage*, 3 Mad. 167-8. *Houghton* v. *Franklin*, 1 Sim. & Stu. 390. (*y*) *Franks* v. *Noble*, 12 Ves. 484. (*z*) *Reynish* v. *Martin*, 3 Atk. 330.

(*a*) 2 P. Will. 501. 2 Eq. Ca. Abr. 83. pl. 3. 646. pl. 22. *S. C.*

(*b*) *Ante*, p. 580. (*c*) 1 Eq. Ca. Abr. 300.

father would not be good, unless made with the child's consent, or it were afterwards confirmed by him.

It may therefore be laid down as a general rule, that where a legacy is given *to* an infant, generally, an executor cannot, with safety, pay it to the child, or to another person, for his benefit. This rule was carried to a great length in the following case:

In *Dagley* v. *Tolferry*,(*d*) *A.* having a sister, who had four infant children, bequeathed 100*l.* a piece to those children, mentioning no time of payment; and he appointed the defendant executor. It was in *proof* that the testator, on his death-bed, directed his executor to pay the legacies to the *father* of the infants, to improve the money for their benefit. In consequence of that direction, payment was made to the father; when the youngest child came of age, accounts were settled between him and his father, on which the latter was indebted to his son in 200*l.* including the legacy of 100*l.* and for which balance the son accepted his father as his debtor; a circumstance urged by the executor, as a *confirmation* of his payment of the legacy to the father. The son acquiesced in the payment for *fifteen* years; and upon his bankruptcy, his assignees claimed the legacy from the executor, and obtained a decree at the Rolls from Sir *John Trevor* for payment of it, on the ground that payment of the legacy to the father and guardian was illegal. And Lord *Cowper*, C. (to whom the executor appealed) was of the same opinion, and confirmed the decree; saying, "that if it were reversed, it might encourage payments to parents and guardians in wrong of infant children;" but the case being considered a hard one, the deposit was ordered to be divided.

That *parol* evidence of the testator's direction to his executor to pay the legacies to the father was admitted by the Court, is singular, as the effect of it was to contradict the will that expressly gave the legacies to the children, which necessarily imports payment to them. The propriety of its admission was reasonably questioned by Lord *Alvanley*, in *Cooper* v. *Thornton*. He consulted the *Registrar's* book, and observed, it appeared from the book that the evidence was read, but *doubted* whether it ought to have been received. "It would be dangerous, (said his Lordship) to admit evidence, that a legacy, given to *one* person, was ordered to be paid to *another*.(*e*)

There is another sigularity attending the last case, *viz.* that acquiescence by the child for fifteen years after payment of the legacy to his father, should not be permitted to constitute a confirmation of it. But the principle arises out of the relation between parent and child, *i. e.* filial duty to a father. Lord *Alvanley*, in the case last referred to, expressed himself on this subject to the following effect: "Although the money was directed to be, and was, paid to the father, and the son acquiesced a great length of time, still it was competent to him or his representatives to demand it; because a contrary determination would encourage such payments, and a *son* must acquiesce, or *pursue* his *father;* or, which is the same thing, by commencing a suit against the executor, occasion *him* to

(*d*) 1 P. Will. 285. 1 Eq. Ca. Abr. 300. *S. C.* Reg. lib. anno 1714. fo. 414. anno 1715. fo. 40.

(*e*) 3 Bro. C. C. 97. edit. by Belt. *infra.*

pursue the father. I take that to have been the ground, on which Sir *John Trevor* and Lord *Cowper* went in *Dagley* v. *Tolferry;* and that if the Legatee had not stood in such relation to the person to whom the legacy was paid, the bill would have been dismissed."

The next case being compromised, merely affords Lord *Hardwicke's* sentiments in regard to the rule. And although his Lordship's opinion inclined in favour of the validity of the payments made to the infant legatees, yet, upon reflection, he declined to pronounce a decree in conformity with that opinion, in opposition to Lord *Cowper's* judgment in *Dagley* v. *Tolferry*. Besides, in the case before Lord *Hardwicke*, the executor was misled by the testator's own directions in his will to pay the legacies within a certain time, a circumstance observed by Lord *Alvanley* to be entitled to consideration in the judgment.(*f*)

The case alluded to in *Philips* v. *Paget*, of which we have not any account except in the report of Mr. *Atkyns*.(*g*) There the testatrix gave to each of the three children of Mr. *Philips* 100*l*. and appointed the defendant executor, leaving him the bulk of her estate, *provided* he paid the three legacies *within a year* after her death, pursuant to her will. In performance of the condition the defendant paid the legacies into the hands of the infants, *within the time*, the eldest of them being then sixteen, the second fourteen, and the youngest nine years old, upon a bill filed by the children against the executor for payment of their legacies, Lord *Hardwicke* asked the executor's counsel if they knew any instance of payment of so large a sum of money into the hands of minors, ever having been allowed by the Court. He then added, "but in this case, as the payment by the executor to the children themselves is so fully proved, and their losing the benefit of it is owing to the negligence and insolvency of the father, I will not strain the rules of the Court to make an executor pay it over again, *especially* as *he* made the *payment to save a forfeiture*, it being an *express condition* of his taking under the will, that he should discharge the legacies *within a year* after the testatrix's death." Notwithstanding the specialty, his Lordship on the following day observed, that upon looking into the cases he found the present a very *doubtful point*, and *unless* the defendant would *agree* to *give the plaintiff something*, he would not determine it without taking time for consideration; a recommendation which produced a compromise, and was not a little significant to the executor of what would have been the ultimate decision of the Court.

Such being the rule of law in regard to the invalidity of payments made to or for infants, of legacies given directly to them; executors who were desirous of being discharged from their office, after having performed all their other duties, were under the necessity of procuring bills to be filed against them by the legatees to enable them to dispose of those particular legacies under the direction and indemnity of a court of equity. But opportunity of avoiding this inconvenience and expense appears to have been provided by stat. 36 Geo. 3. c. 52. s. 31, by which it is declared, that an executor may pay the legacy of an infant into the Court of Chancery, after

(*f*) 3 Bro. C. C. 98. (*g*) 2 Atk. 80.

deducting the duty, without suit, and when the legatee attains the age of twenty-one he may petition for it. It seems therefore that in instances where this summary mode can be adopted, if a legatee unnecessarily commence a suit to have his legacy secured, the *costs*, as heretofore, will not be allowed out of the testator's general assets, to the prejudice of the residuary legatee.

In *Whopham* v. *Wingfield*,(*h*) a legacy was given to an infant who, with her husband, when she was within a few months of twenty-one, instituted a suit to have the money secured. Assets were admitted, and the usual decree made that the legacy should be paid into Court, with *costs* out of the general estate. The residuary legatee complained of the hardship to fix the costs upon him, when if the plaintiffs had waited for a few months, they might have received the legacy without a bill. And Lord *Alvanley* said, that in such a case he would not in future give the costs, for since the late Legacy Act, the executor had nothing to do but to pay the money into Court, and then he had done, and the infant when of age might petition for it.

It is a consequence from the rule we have been considering, that testators ought not only to bequeath to *trustees* legacies intended for minors, to whom the money may be safely paid, but to grant *fixed* allowances for their support and education during infancy, and to give authority to the trustees to apply certain proportions of the capitals for the preferment of the minors in the world, when such objects are intended to be provided for. Because since, as we have seen, an executor cannot, without personal risk, pay the whole or any part of a legacy directly bequeathed *to* an infant, either to the child or to any person for his use; neither can he with safety apply any part of the interest or principal for the minor's maintenance or preferment without the direction of a court of equity, unless he be expressly authorized to do so, and the proportions are ascertained by the testator. Indeed, if maintenance be directed generally without saying how much the *uncertainty* of amount will render an application to a court of equity necessary. But as executors or trustees are sometimes desirous of undertaking personal responsibility to save expense to the estate, it may be useful to observe that they can only be justified in applying to maintenance part of the *interest* of the fund, and by no means any portion of the *principal* without the authority of the testator. For the Court has never permitted executors or trustees to break in upon capital of their own accord. It has never, as is presumed, sanctioned such conduct in them. Rarely has the Court applied part of *capital* for *maintenance*, though frequently for the *advancement* of the child. But whatever the Court *might* do under particular circumstances, it will not in this instance *sanction* an executor or trustee in doing the same. The principle is this: "It is better that an individual should suffer a hardship than that the general rule should be infringed in a point which would endanger the interests of all children."(*i*) Thus far as to *capital*. But when the question arises upon application by an executor or trustee of part of the *interest*, for the support of an infant-legatee, without the authority of the testator, it would seem that, if he did

(*h*) 4 Ves. 630. (*i*) 6 Ves. 474.

no more than what the Court would have directed if it had been resorted to in the first instance, his act would be supported. Lord *Alvanley* expressed himself on this subject to the following effect: "The principle has been established since *Andrews* v. *Partington*,(*k*) that if an executor do without application what the Court would have approved, he shall not be called to account, and forced to undo that merely because it was done without application." After these preliminary remarks, we shall proceed to consider the cases.

In *Davies* v. *Austen*,(*l*) a legacy of 500*l.* was directed to be paid to *W. Green* at the age of twenty-one, with legal interest in the mean time. The legatee had no other immediate provision but the above sum, and the following expenditure was made for him during his minority; while his father was living, interest was paid to him for the maintenance of his son, the father not being of ability to discharge that obligation. After his death, the payment was continued to the mother of the legatee until her second marriage, and from that time to Mr. *Jones*, her second husband. Those payments were not disputed. But Mr. *Jones*, after placing the legatee in the service of an *English* sea-captain, with the consent of one of the executors, paid the captain 100*l.* for the discharge of the legatee. After this Mr. *Jones*, with the like consent, placed his son-in-law at a military academy, the expenses of which amounted to another 100*l.* And in conclusion Mr. *Jones* fitted him out and sent him to *India* in the service of the *East India* Company; the expenses attending which were 200*l.* The total amount of payments for the maintenance and advancement of the legatee amounted to 650*l.* Soon after the legatee arrived in *India*, he attained the age of twenty-one, and sold and assigned his legacy to the plaintiff, who sought to recover it from the executors, who contended that the whole legacy, principal and interest, had been properly applied for the maintenance and *advancement* of the legatee; but the purchaser insisted that no payments should be allowed, except of so much *interest* as had been applied for the support or provision of the legatee. And Lord *Thurlow* said, he was not satisfied that the advancements which had been made were for *necessaries*. In particular he thought the 100*l.* to the *English* captain was too much. He therefore ordered the *whole* legacy to be paid, with interest from the time when the legatee attained twenty-one.

The last is a clear authority against the power of trustees or executors to apply the capital of legacies, given to infants for their maintenance or advancement; there they were neither allowed the expenses of the legatee's outfit to *India*, nor of his previous education at home, so far as the payments exceeded the *interest* of the legacy, for the *whole capital* was ordered to be paid to the purchaser.

The case that followed was *Lee* v. *Brown*,(*m*) determined by Lord *Alvanley*, in which the testatrix gave to her brothers and executors, *William* and *Edward Brown*, 100*l.* in trust to apply the interest for the maintenance and education of her great nephew *John Lee* during his minority, and to transfer to him the capital at twenty-one, with a limitation over upon his death under that age. The executors applied more than the interest of the legacy in maintaining and edu-

(*k*) 3 Bro. C. C. 60. (*l*) Ibid. 178. (*m*) 4 Ves. 362. *et vide post.*

cating *John Lee*. They also paid a fee of one hundred guineas on placing him as an apprentice with a druggist. *William Brown*, the executor, left him a legacy of 200*l.* to be paid at the age of twenty-two, appointing his co-executor *Edward Brown* his own executor. *John Lee* duly authorized a Mr. *Orchard* to receive the 200*l.* for him, and all other monies and effects due to him. *Orchard* applied to *Edward Brown* for the last legacy in the year 1787, which he received and gave a discharge. Not any demand was made, nor notice taken of the preceding legacy of 100*l.* nor any claim made for it till 1797, when *Lee* commenced the suit. In defence to which *Edward Brown* insisted, that by the advancements for the benefit of the legatee during minority, the 100*l.* was fully and properly paid. But Lord *Alvanley* was of the contrary opinion, upon the principle, that the executors had no power to apply more for the maintenance of the legatee, than the *interest* of his legacy. That they were not at liberty under the *trust* reposed in them to advance any part of the capital, although it would have been ever so much for his advantage. His Honour was also of opinion, that there was no confirmation by *Lee* of the advancements, nor satisfaction of the bequest by the subsequent legacy of 200*l.* and notwithstanding an acquiescence of *ten years*, he ordered payment of the 100*l.* with *interest* from the filing of the bill at 4*l. per cent.*, but without costs.

Upon the principle of the preceding authorities, Sir *W. Grant* determined the case of *Walker* v. *Wetherell*.(*n*) It appeared that infant children were entitled to portions of 300*l.* each under the will of their father, and that their mother married one of the executors, who claimed, and was allowed by the Master sums of money expended in the maintenance, education, and preferment of the children, which far exceeded the *interest* of their respective fortunes. Whether such payments ought to be allowed was the simple question, there being no particular circumstances in the case. And Sir *W. Grant* was of opinion, that the application of capital could not be allowed upon principles of general convenience.

The cases which have been mentioned were considered as bearing grievously upon executors, but a particular hardship was endured for the sake of the general good. If, however, a court of equity can discover a clear act of the legatee, when of age, confirmatory of the application of his legacy by the executors for his benefit during minority, it will hold him to be estopped from claiming a repayment. Hence, if a legatee, after attaining twenty-one, with a knowledge of his rights, and upon full consideration of all that had been done for him during infancy, *admit*, by any act, that the advancements made for him while a minor had been for his advantage, and that he approved of them, and was willing that they should be established, he will not afterwards be permitted to dispute their propriety. But the intention to confirm the transactions must not be equivocal, as a person is not allowed to surrender a right except his intent to do so be manifest. We have accordingly seen in *Lee* v. *Brown*,(*o*) that neither the receipt of the subsequent legacy under the circumstances before stated, nor an acquiescence for *ten years*, were considered sufficient to preclude the legatee from disputing the proper applica-

(*n*) 6 Ves. 473. (*o*) *Ante*, p. 593.

tion of the legacy given him by the will of his great aunt. And in *Dagley* v. *Tolferry*,(*p*) when it appeared that the father had been paid his child's legacy, an acquiescence by the child for *fifteen years* did not extinguish his right to call upon the executors for repayment.

When the direction to the executor is not to pay the legacy to the child, but the bequest is made to a *trustee* for him, the executor will be justified in delivering the money to the person so appointed. Hence, if the testator order the sum to be paid to the *father*, he will be a trustee for his child, and entitled to receive the money, and his receipt will be a good discharge to the executors.

Thus in *Cooper* v. *Thornton*,(*q*) the bequest was of 100*l.* "to *Thomas Cooper*, to be equally divided between himself and his family." The legacy was paid to *Thomas* by one of the executors, and the only question was, whether the payment was good against the claims of the infant children? and Lord *Alvanley* decreed in the affirmative, on the principle, that the bequest was to the father, in *trust*, to be *divided by him* between himself and family. And his Lordship put these cases, "if a man give a legacy to the senior Six Clerk, to be divided among himself and the other six clerks, I think it should be paid to the senior, and the executors not to be put to inquire who were the other six clerks. And that, if this had been a bequest of *goods* to *A.* to be divided between himself and family, *A.* with the assent of the executor, might bring trover for the goods."

So in *Robinson* v. *Tickell*,(*r*) the testatrix bequeathed to her niece Mrs. *Robinson* 2000*l.* reduced annuities in these words, "to *M. Robinson* for her and her children's use." The suit was instituted by Mrs. *Robinson* and her husband, for a transfer of the fund, which Sir *W. Grant*, M. R. ordered, referring to the last case.

We proceed to consider in the next place,

B.—To whom are to be paid legacies given to married woman.

When bequests are made to the separate use of married women, they alone can give a good discharge for them. Their husbands have no interest in the funds, therefore their concurrence is unnecessary. But when the gifts are to married women generally, the money ought to be paid to their husbands; for the law will not allow a married woman either to receive or pay money, without the concurrence of her husband; so that unless she act as his agent with due authority,(*s*) and the legacy is paid to her in that character, payment of it to her alone is void against him, and he may recover it against the executors:(*t*) notwithstanding she is divorced *a mensâ et thoro*.(*u*)

But if the husband have not made any provision for his wife, the executors may decline to pay the legacy, until he consent to make a suitable provision for her, as the Court of Chancery, upon the bill of the husband for the money would refuse to order payment to him, unless he consented to a reasonable settlement out of it upon the

(*p*) *Ante*, p. 590.
(*q*) 3 Bro. C. C. 96. affirmed on appeal by Lord *Thurlow*, ibid. 186.
(*r*) 8 Ves. 142. (*s*) Palm. 206. 2 Freem. 178.
(*t*) *Palmer* v. *Trevor*, 2 Vern. 261.
(*u*) *Stephens* v. *Totty*, Cro. Eliz. 908. 1 Roll. Abr. 343. 2 Ib. 301. Bac. Abr. title Legacies (K.)

legatee. The Court is in the constant habit of acting in this manner; therefore one authority upon the subject shall suffice.

In *Brown* v. *Elton*,(*x*) the plaintiff married a young lady who was entitled to a legacy payable on her marriage. The plaintiff demanded the money, which the executor refused to pay, unless the husband would make some settlement or provision upon his wife. The plaintiff refused to do so, and commenced the suit to recover the legacy. The Master of the Rolls decreed, that the plaintiff should lay proposals before a Master for a settlement, and pay the costs of the suit: from this decree he appealed to Lord *King*, C., who confirmed the decree, except as to *costs*, which he thought ought not to be paid by a man, merely because he insisted upon a right which the law gave him.

His Lordship's sentiments upon Courts of Equity abridging that right, were expressed to the following effect: "I found it to be the practice at my coming into this Court, to enforce the husband, before he recovers his wife's portion by the aid of equity, to make a settlement; and as such practice has *so long* obtained, I shall not at this time take upon me to alter it, although it seems to break in upon the *legal* title, which the husband has to his wife's personal estate. This method, however, intended originally as a cautionary provision in favour of the wife, has sometimes proved inconvenient; yet custom and long usage have sufficiently established it."

But when the wife has eloped from her husband, and cohabits with another man, the executor may refuse payment of her legacy to her husband, without the direction of a Court of Equity. First, because, in such a case the Court will not make any provision for such a woman, while she continues in that state of life; for the effect of the provision would be to enable her to continue the same criminal intercourse. And secondly, it will not order any part of the money to be paid to her husband, as he neither supports her, nor can claim any portion of the fund until he make provision for her, which the Court will not direct in this instance. It seems, that all it could do would be, to order the legacy to be paid into Court.(*y*)

Yet where not any criminality attaches to the wife, but, while she is living apart from her husband under a deed of separation, a legacy is given to her, as the Court will interpose in her behalf for a provision, and the husband is entitled to the money upon making it,(*z*) the executor may insist upon a settlement on the wife, as a condition preceding his paying the legacy to the husband.

It seems, that if the feme-legatee be the subject of a *foreign* state, by the law of which her husband would be entitled to receive the *whole* of her property, without making any provision for her, the Court will order the fund to be paid to her husband, without requiring him to make any settlement,(*a*)

The Court, in making a provision for the wife, always includes the children of the marriage. But whether the husband shall make

(*x*) 3 P. Will. 202.

(*y*) See *Ball* v. *Montgomery*, 4 Bro. C. C. 339. 2 Ves. jun. 191. *S. C.* *Carr* v. *Eastabrooke*, 4 Ves. 146. Law of Husband and Wife, 1 vol. c. 7. where the subject is more particularly considered.

(*z*) *March* v. *Head*, 3 Atk. 720. and Law of Husband and Wife, 2. vol. ch. 22.

(*a*) Vid. *Campbell* v. *French*, 3 Ves. 323. 1 Anstr. 63.

any such provision, before he receives the legacy, solely depends upon the wife. For if she, at any time before the business is completed, appear in Court, and consent that her husband shall have the *whole* of the legacy, it will be so altered that, although the children be thereby disappointed,(*b*) yet, if after an order made for the husband to lay proposals before a Master for a settlement, the wife die without waiving it, her children will be entitled to prosecute the order, and obtain a provision.(*c*)

The equity of the wife to oblige her husband to make a suitable provision for herself and children, in consideration of her fortune, in instances where he cannot obtain the whole or part of it without the assistance of a Court of Equity, is obligatory upon all persons claiming *generally* from or under him, as executors, assignees in bankruptcy, or insolvency, or assignees by deed in trust to pay debts. So that, if the husband become a bankrupt or take advantage of the insolvent acts, or assign his property to trustees for the benefit of his creditors, including the interest of his wife, they will be obliged to make provision for her and children, before they be permitted to receive it, whether the legacy be absolute or for *life* only.(*d*)

Whether a particular assignee by purchase from the husband, of the wife's legacy be liable to her equity for a settlement, has been a question of considerable doubt, and great men have entertained contrary opinions on the subject. It seems however to be the better opinion that such an assignee will not be allowed to take the wife's *equitable* property, without making a provision for her, as a contrary adjudication would enable the husband to defeat at all times the care and caution of the Court, by his taking up money of a third person and assigning the legacy in payment.(*e*)

It has been generally understood that this rule of the Court extended to cases, as well where the wife was only entitled to a *life* estate in the fund, as where the bequest to her was *absolute*. But there is a recent determination marking a distinction between the two instances. It was decided that if the dividends of stock be bequeathed to a married woman for life, her husband may sell it, and the purchaser is under no obligation to make a provision out of it for the wife and children.

The case alluded to is *Elliott* v. *Cordell*,(*f*) in which the testator bequeathed to his niece Mrs. *Elliott* the dividends of certain imperial annuities for life. She had infant children unprovided for, and the dividends of the imperial annuities were sold by her husband to the defendant, and were assigned by her and her husband to a trustee for the defendant. The question was, whether Mrs *Elliott* was entitled to a provision by the *purchaser* out of the dividends? And Sir *John Leach*, V. C. determined in the negative.

As the last may be considered an important decision, it becomes necessary to ascertain with precision the weight of the principal

(*b*) See Law of Husband and Wife, ch. 7. for further particulars.
(*c*) Ibid. where the wife's consent will and will not be effectual, see Law of Husband and Wife, 1 vol. ch. 6. p. 243. to 255. and vol. 2 ch. 20. p. 210, &c.
(*d*) 5 Madd. 156. and see Husband and Wife, 1 vol. ch. 7. p. 266. *Pryor* v. *Hill*, 4 Bro. C. C. 139. and *Burdon* v. *Dean*, 2 Ves. jun. 607.
(*e*) Husband and Wife, ch. 7. p. 266, &c. and *Salisbury* v. *Newton*, 1 Eden. 370.
(*f*) 5 Madd. 149.

reason assigned in support of the judgment, in order to discover the necessity for distinguishing between an interest for life, and a gross sum of money bequeathed to a married woman, in regard to her title to a provision against the *vendee* of the husband: for it was admitted that, as against the husband his assignees in bankruptcy, or under the insolvent debtors act, the wife is entitled to a settlement.

The Vice Chancellor said, that, where the *equitable* interest given to the wife was *absolute*, all persons claiming under the husband took his interest, subject to the same equity with which it was affected in his possession; but where that interest was for life only, the husband was entitled to enjoy it without making any provision for his wife. But it is presumed that the latter proposition must be received with limitation. For if the husband can procure payment of the annual produce of the fund, he has the same right to enjoy it without recal, as if it had been a gross sum absolutely given to his wife, the receipt of which he had procured without suit. But if he be obliged to resort to a Court of Equity for payment of either, then it is considered that the Court will not assist him, previously to submission, to make a settlement on his wife. That this would be the case, if the interest of the wife was only *for life* is not destitute of authority, as was supposed by his Honour, so that his apprehensions that in determining in favour of the wife, he should not be administering the law of the Court, but be making a new law, (a jurisdiction he disclaimed), do not seem to have been well founded. We have the authority of Lord *Rosslyn* for the proposition, that, whether the interest of the wife be only for *life*, or be *absolute*, in the property, the *husband* cannot enforce in equity the payment of it, without first consenting to make a settlement; and if such be the rule as considered by his Lordship, then upon the principle admitted by his Honour in the present case, the husband's particular assignee must take the assignment of the *chose in action*, subject to the same equity.

In *Ball* v. *Montgomery*,(*g*) 5000*l.*, three *per cent* annuities (the wife's property) were settled upon her marriage, but no provision was made by the settlement for the payment of the dividends during the overture; which, on the ground of mistake, the husband sought to rectify by the aid of a Court of Equity, and he prayed that the dividends might be declared to belong to him during the marriage in opposition to his wife, who had eloped from him and was living in adultery, she claiming such dividends to her separate use under an alleged prior agreement. Lord *Rosslyn* refused to correct the settlement, as, without an *express* provision, the dividends were payable to the husband during the coverture. The question then was, whether, as the husband, who would in an ordinary case be entitled to the dividends, was so in the present instance? and if entitled, whether he ought to make a provision for his wife; and it was admitted by counsel on both sides, that where there was not any contract for the husband to receive the dividends of property belonging to the wife during the coverture, the husband, if he were obliged to resort to equity to compel their payment, must submit to

(*g*) 4 Bro. C. C. 339. 2 Ves. jun. 196. *S. C.*

make a provision for his wife,(*h*) but the counsel for the husband contended that there was such a contract in this instance, which was denied by the Court. And Lord *Rosslyn* said, "I can make no distinction between *this* case and *that of a sum* of money so given, that the husband could not obtain it, but by coming to this Court, which is the case, wherever a woman is entitled without an appropriation.(*i*) The delinquency of the woman is in this case a reason for not giving it to *her*, and I cannot give the whole to the husband, on account of her interest: I must secure a part for her, or reduce her to beggary. This will lead to an agreement to make a provision for her. Probably, had the last case been cited in argument, or occurred to the Vice Chancellor, his decision would have been otherwise than what it was. Therefore the case of *Elliott* v. *Cordell* wants confirmation.

An executor or trustee may pay the wife's legacy to her husband, which will defeat her right to a settlement; but if there be a suit pending, the executor or trustee cannot make the payment, because his office is suspended, and the Court of Chancery has become the trustee.(*k*) (*l*)

The recent case of *Adams* v. *Lavender*,(*m*) determined that the wife was entitled by survivorship to a legacy which devolved upon her during the coverture; and for recovering which a suit had been instituted by her husband in their joint names, and a decree had been obtained during his life, for an *account merely*, and not for the actual payment of the money due. *Alexander*, C. B. observed, that no case he could find went the length of showing, that if the husband and wife sued in their joint names, a decree for payment would have the effect of barring her: under such circumstances, a Court of Equity would follow the rule, at law. But in this instance, the decree had not gone so far, but only to the extent of an account before the Deputy Remembrancer.

C.—With respect to the payment of a legacy to a lunatic.

A lunatic is legally incapable of contracting, yet as he may have lucid intervals, acts done by him during such interval of sanity are binding;(*n*) but otherwise his acts (except by matter of record,)(*o*) are void at law, and after office found may be avoided by the King, by virtue of the statute *de prerogativâ regis*.(*p*) The King is absolutely entitled to the profits of an *idiot's* estate, subject to the maintenance of the idiot;(*q*) but with respect, to *lunatics*, he is merely a *trustee*, and, by special warrant, usually entrusts the Chancellor, as Keeper of the Great Seal, with the care of lunatics. The Chancellor, after office found, appoints a committee of the person and estate of the lunatic; and, thus appointed by and under the control of the Chancellor, the committee is invested with all powers necessary to the discharge of his office, as bailiff and receiver of the

(*h*) 2 Ves. jun. 196. 197.

(*i*) Or as in Vesey, "and it is not specifically given to the husband."

(*k*) *Murray* v. *Elibank*, 10 Ves. 90. *Macaulay* v. *Philips*, 4 Ves. 18. *Doswell* v. *Earle*, 12 Ves. 473.

(*l*) As the rights of the wife and children to a settlement are fully detailed in 1 vol. of Roper's Husband and Wife, c. 7. it is thought unnecessary to enter further into the subject in this place.

(*m*) M'Clel. & Young. R. Exch. 41.

(*n*) 9 Ves. 610. (*o*) *Beverlay's* case, 4 Coke, 127. (*p*) 17 Edw. 2. c. 10.

(*q*) Ibid. c. 9, 2 Scho. & Leaf. 153. In re *Fitzgerald*, 435.

estate of the lunatic. It is therefore his duty to watch over the interests of the lunatic, and to enforce his rights.

But though void at law, the acts of a lunatic may, under circumstances, be supported in equity. It does not appear that the validity of such acts depends upon the question, whether they were or were not done before office found, but whether the person contracting or dealing with the lunatic entered into such contract or dealing *bonâ fide*, and without notice of his imbecility. If, therefore, a legacy be paid by an executor *bonâ fide* and *without notice* to a lunatic, who should afterwards be found by an inquest to have been *non compos* with lucid intervals previously to the time of payment, it should seem clearly that such payment would be supported, if the executor could establish a lucid interval at the time of payment.(*r*) But even if the finding, in the case supposed, had been that the lunatic was *non compos without* lucid intervals before or at the time of payment, it should appear, that if the executor could prove the payment made *bonâ fide*, and without notice, the Court would not interfere to set aside the payment, but leave the party seeking the aid of the Court to his remedy (if any) at law.(*s*)

If however a commission have issued, and a committee be appointed, he is the proper person to receive and give a discharge for a legacy due to the lunatic; and it may perhaps be stated as a general rule, that in such case payment of the legacy to the lunatic is void, and it may be recovered by the committee from the executor. If, in the case last supposed, the inquest, upon which the commission was founded had found the lunatic *with lucid intervals*, any subsequent payment to the lunatic during a lucid interval, could it be established, would be very hazardous; since, until the commission is superseded, it is presumed the committee is the only proper person to receive the legacy; and the risk would be in proportion to the difficulty of proving the want of notice of the lunacy.

It is difficult, if not impossible, to lay down general rules that shall be applicable to every case, since each must depend in a great measure upon its own peculiar circumstances.

If a legacy be given for the benefit of the legatee in one way, and on account of his subsequently becoming lunatic it cannot be so applied it may, it would appear, be applied for his benefit in another mode.(*t*)

D.—With respect to a legacy given to a bankrupt.

Where a legacy is given to a bankrupt, before the certificate is allowed and confirmed by the Chancellor, the legacy must be paid to the assignees.

In *Tudway* v. *Bourn*,(*u*) a testatrix bequeathed a legacy of 200*l.* to one *Coward* a bankrupt, whose certificate had, at the time of the testatrix's death, been signed by the majority of his creditors in number and value, and also by the commissioners; after the bankrupt's death and before the allowance of the certificate, the commissioners assigned the legacy to an assignee for the creditors. Upon a question referred to the Court of King's Bench, whether the legacy

(*r*) *Hall* v. *Warren*, 9 Ves. 605.
(*s*) *Niell* v. *Morley*, 9 Ves. 478.
(*t*) *Per* Sir *W. Grant*, 5 Ves. 463. See *Barlow* v. *Grant*, 1 Vern. 255.
(*u*) 2 Burr. 717.

belonged to the bankrupt's executor or to his creditors, the Judges certified, that the legacy vested in the assignee for the benefit of the bankrupt's creditors.

E.—When the legacy is given to a legatee who has been abroad and not heard of for a long time.

In such case he has been presumed to be dead, and the legacy paid to those who would be entitled in that event; they giving security to refund, in case the legatee should return.

In *Norris* v. *Norris*,(*x*) a legacy was given to one of two brothers who went beyond sea, and after *five* years absence, the other, suggesting he was dead, took out administration, and sued for the legacy, which was decreed, he giving security to refund if the legatee should return.

In *Dixon* v. *Dixon*,(*y*) a legatee having been abroad twenty-eight years, and not having been heard of for twenty-seven years, Lord *Alvanley*, M. R. said he would presume him to be dead.

Again, in *Mainwaring* v. *Baxter*,(*z*) a party was presumed to be dead after an absence of *sixteen* years without any tidings of her.

In *Bailey* v. *Hammond*,(*a*) the same presumption was made after an absence of *twenty* years; but security was taken there to refund in case of a claim.

But where the fact of death is doubtful, and the parties wish it, the Court will direct an issue.(*b*)

The statute 36 *Geo.* 3. c. 52, sect. 32, authorizes the executor or administrator to pay legacies given to persons abroad into the Bank, with the privity of the Accountant General, as in cases of legacies given to infants.

6. As to deductions and retainer.

A.—And, first, with respect to those legacies which are subject to deduction for duties under the Stamp Acts, and the *quantum* of duty payable.(*c*) Legacies of every description, including donations *mortis causâ*, of or above the value of 20*l.* each, and payable out of personal estate, or out of or charged upon real estate, or out of the monies to arise by sale or mortgage or other disposition thereof; also clear residues or shares of clear residues of personal estate, or of monies to arise from the sale, mortgage, or other disposition thereof, and whether given by way of annuity or otherwise,(*d*) are charged with certain duties imposed by several Acts of Parliament referred to in note.(*e*) These duties are to be ultimately paid by the respective legatees, unless expressly exempted therefrom by the will of the testator,(*f*) in which case they are payable by the executors or administrators out of the effects of the deceased.(*g*)

Legacies charged upon or payable out of the produce of *real* estate were not subject to the payment of duty, until the 45 *Geo.* 3. c.

(*x*) Finch. R. 419. (*y*) 3 Bro. C. C. 510. (*z*) 5 Ves. 458.
(*a*) Ib. 7. 590. (*b*) *Mason* v. *Mason*, 1 Mer. 308.
(*c*) The limits of this work will not admit of a very detailed view of the Stamp Acts which relate to the subject of Legacies, but it was thought an epitome of some of the principal enactments would not, under this head, be unacceptable to the reader.
(*d*) 36 Geo. 3. c. 52. sect. 7, 8. 45 Ib. c. 28. s. 4. 55 Ib. c. 184. Sched. part. 3.
(*e*) 20 Geo. 3. c. 28. s. 3. 23 Ib. c. 58. s. 8. 29 Ib. c. 51. 36 Ib. c. 52. 44 Ib. c. 98. 45 Ib. c. 28. 48 Ib. c. 149. 55 Ib. c. 184.
(*f*) See 36 Ib. c. 52. s. 21. (*g*) *Burksdale* v. *Gilliat*, 1 Swan. 562.

28. In that Act, however, there is an exception, which exempts from duty any sum of money charged by marriage settlement or deed upon any real estate, and which sum shall be appointed by will in exercise of the power.(*h*)

The scale of duties has been varied from time to time, each Act in succession repealing the duties of that which preceded it, and incorporating such provisions of the former Acts as were not expressly repealed by or inconsistent with the last Act for the time being.(*i*)

Legacies of every description, as before specified, with the exception of such as are given to husband or wife of the deceased, to any of the royal family,(*k*) or to certain bodies corporate,(*l*) are charged with the following duties upon the amount or value of such legacies.

When the legatee is a child, or descendant of any child, of the deceased, or the father, mother, or any lineal ancestor of the deceased, a duty of 1*l. per cent.* When the legatee is a brother or sister, or any descendant of a brother or sister of the deceased, a duty of 3*l. per cent.* When the legatee is the brother or sister, or the descendant of a brother or sister of the father or mother of the deceased, a duty of 5*l. per cent.* When the legatee is a brother or sister or a descendant of a brother or sister of the grandfather or grandmother of the deceased, a duty of 6*l. per cent.* And where the legatee is in any other degree of collateral consanguinity, or any stranger in blood to the deceased, a duty of 10*l. per cent.*

The value of *annuities*, or legacies given in the way of annuity, is computed according to the tables annexed to the statute 36 *Geo.* 3. c. 52. s. 8. and the duties are payable on such value, according to the scale before stated, by four equal instalments; the first of which shall be made before or on completing the payment of the first year's annuity, and the three other successively before or on completing the three succeeding years annuity.

The duty on a legacy or residue to be enjoyed *in succession*, chargeable with duties at the same rate, must be charged upon and paid out of such legacy or residue, as if the same were given to one person; but if some or one of such persons, taking in succession, are charged with no duty and some with different rates of duty, the duty shall be charged on the persons taking a life or other temporary interest in such bequest, in the same manner as if it were given by way of annuity. And the person ultimately and absolutely entitled to such legacy given in succession, shall, when such person receives the same, pay the duty upon the same or so much as shall be received, in the same manner as if it had come to such person immediately upon the death of the testator.(*m*)

Legacies given subject to contingencies, defeating the same, unless chargeable as annuities, are subject to the same duties as if they were absolute.(*n*)

Legacies subject to a power of appointment to persons specified, are chargeable with duty in the same manner as a legacy in succession. And where property is given for a limited interest, and

(*h*) Sect. 4. (*i*) 55 Geo. 3. c. 184. s. 8. (*k*) 45 Ib. c. 28. s. 3.
(*l*) 39 Ib. c. 73. 42 Ib. c. 99. s. 4. (*m*) 36 Geo. 3. c. 52. s. 12. (*n*) Ib. s. 17.

an absolute power of appointment is given to a person to whom the property to be appointed would not go in default of appointment, the duty upon the execution of the power will be payable, in the same manner as if the interest were absolutely given to the person exercising the power. And where the power is given to the person absolutely entitled in default of execution, the duty will be chargeable in the same manner on the property, as if it were absolutely given without any power.(*o*)

Money or personal estate, directed to be laid out in the purchase of real estate, must pay duty as personal estate, given in succession or otherwise, according to the nature of the interest in the real estate.(*p*) Under this division of the subject, it will be proper to notice some decisions made on the Acts before specified.

Real estate devised to be sold, and the produce to be deemed part of the residue of the testator's estate, and to go (if necessary) in aid of his personal estate in discharge of money legacies, is liable to the legacy duty imposed by statute 48 *Geo.* 3. c. 149, although the estate be not converted into money, and the residuary legatee take the property *in statu quo*. This was settled in *Attorney General* v. *Holford*,(*q*) upon the principle, that in equity the subject of such a bequest would go after the legatee's death to his personal representatives.

It has been decided that legacies bequeathed by a *British* subject in *India*, out of his personal estate to persons in *England*, are liable to the duty, if the executor prove the will and pay the legacies in *England*; notwithstanding the testator realized and possessed his property in *India*, resided and made his will there, and although the executors were in *India* at the time of their appointment, and the will were originally proved there. This was decided in the case of the *Attorney General* v. *Cockerell*.(*r*)

So where, upon the death of a testator domiciled in *India*, administration with the will annexed was taken out at *Madras*, and also by another person in *Scotland*, and the *Scotch* administrator, as residuary legatee, applied to his own use the surplus which the administrator in *India* had remitted, after the payment of debts, it was held that the residuary legatee in *Scotland* was liable to the duty, because the estate was applied there.(*s*)

So also, where no administration is actually taken out, but a suit instituted by the legatees against the executors abroad and his agents in *England*, legacy duty will be payable; because previously to such a suit, administration ought to be taken out, and the administrator made a party. This was decided in the late case of *Logan* v. *Fairlie*,(*t*) where the following distinction was laid down by Sir *John Leach*, V. C. "If a testator die in *India*, and his personal estate be wholly in *India*, and his executor be resident there, and the will be proved there, and the executor remit to a legatee in *England*, or to some other person in *England* for the specific use of the legatee, the amount of his legacy, I am of opinion that the legacy duty is not payable upon such remittance, inasmuch as the whole estate is ad-

(*o*) Ib. s. 18.
(*p*) Sec. 19. also 45. ch. 28. sect. 5.
(*q*) 1 Price, Excheq. Rep. 426.
(*r*) 1 Price, Exc. Rep. 165.
(*s*) *Att. Gen.* v. *Beatson*, 7 ib. 560,
(*t*) 2 Sim. & Stu. 284.

ministered in *India*, and the remittance is in respect of a demand, which is to be considered as established there. But if a part of the assets of the testator is found in *England*, in the hands of the agent of such executor, without any specific appropriation, and a legatee in *England* institute a suit here for the payment of his legacy out of such unappropriated assets, then such assets are to be considered as administered in *England*, and the legacy duty is payable in respect of them.

But where the testator died in *India*, and the property was administered by executors there, who specifically appropriated in *India* securities sums for the satisfaction of legacies, and remitted the dividends to *England* for the benefit of a legatee, for whom a guardian was appointed by the Court of Chancery, it was held no duty attached upon such remittances.(*u*)

A legacy given by a will before the 5th of *April* 1805, but not paid, retained, satisfied, or discharged, is subject to the duty imposed by the 48 *Geo.* 3. c. 149. sect. 3. A legacy was given in 1771 to a legatee for life, and after his death to his children; in 1794 the executors invested it in their own names, and the interest was duly paid to the legatee for his use until 1812, when he died; and it was decided that the legacies to the children were subject to the duty of 8*l. per cent.*, notwithstanding the investment by the executors.(*x*)

But in a case where 3000*l.* was given to trustees to invest it and pay the interest to *A.* for life, and after his death to transfer it to *B.* and under a decree the legacy was paid into Court and invested, previously to the duty imposed by 20 *Geo.* 3. c. 28.; *B.* being then an infant, it was held that it was a sufficient appropriation of the legacy within the words of stat. 48 *Geo.* 3. c. 149. "paid, retained, satisfied, and discharged," before the 10th of *October* 1808.(*y*)

Where one legacy is given by will, free of duty, and by a codicil another is given *in substitution* of that given by the will, and upon the same trusts, the substituted legacy is also free from the duty which must be paid by the testator's effects.

This was settled in the case of *Cooper* v. *Day*,(*z*) where the testator gave 4000*l.* to trustees, in trust for his daughters, and directed the legacy duty thereon to be paid out of the residue. By a codicil he revoked the gift of 4000*l.* and gave 5000*l.* upon the same trusts, &c. as were expressed by the will concerning the legacy of 4000*l.*; then by second codicil he revoked the gift of 5000*l.* and gave 6000*l.* upon the same trusts; and it was held that this was not a revocation, but a substitution in each instance, and therefore that the 6000*l.* was exempt from the legacy duty.

So also, where a testator bequeaths a legacy, declaring that it should be exempted from duty, and afterwards bequeaths a subsequent legacy either by his will or by a codicil, "*in addition*" to the former legacy, it should seem the additional legacy would be subject to the incidents and conditions of the former, and consequently be, like it, free from the legacy duty.(*a*)

(*u*) *Hay* v. *Fairlie*, 1 Russ. 117. (*x*) *Att. Gen.* v. Lady *Manners*, 1 Price, 411.
(*y*) *Hill* v. *Atkinson*, 2 Mer. 45. *S. C.* 3 Pri. 399. (*z*) 3 Mer. 154. *ante*, 587.
(*a*) *Chatteris* v. *Young*, 6 Mad. 80.

So where a legacy is given "*without deduction*," the legatee will not be chargeable with the duty, but the executor must pay it out of the testator's assets.(*b*)

B.—We next proceed to consider, *by whom* the duties are to be paid and retained.

The Act of 36 *Geo.* 3. c. 52, enacts, that the duties, in all cases wherein it is not otherwise thereby provided for,(*c*) must be paid by the executor or administrator, upon retainer for their own benefit, or for the benefit of any other persons, of any legacy or part of legacy, or of the residue or any part of such residue, which they shall be entitled so to retain; and also upon delivery, payment, or discharge of any legacy or residue, &c. to which any other person shall be entitled; and in case such executor or administrator shall so retain such legacy or residue, &c. upon which duty is thereby chargeable, not having first paid the duty, or shall deliver, pay, or discharge any legacy or residue, &c. to which any other person shall be entitled, having received or deducted the duty, then the duty chargeable on every such legacy, &c. which shall not have been paid, shall be a debt from such executor or administrator to the King; and in case they shall have paid the legacy or residue without having received or deducted the duty, then it shall be a debt due to the King, both from them and also from the persons to whom the legacy or residue shall have been paid.

The duty charged on an *annuity*, or on a legacy by way of annuity, is calculated according to the Tables of the Act,(*d*) and must be paid by the persons entitled to the same, and deducted by four successive instalments out of the four first years annuity.

The duty on a legacy or residue to be enjoyed by different persons *in succession* on whom the duty is chargeable at one and the same rate, shall be deducted and paid by the executor or administrator on payment of every or any part of the legacy or residue to any trustee or other person to whom the same shall be payable; and where the legacy or residue shall not be paid to a trustee, the duty shall be deducted out of the capital of the property so given, on receipt by any of the persons so entitled in succession, of any produce of such capital, according to the amount of the capital of which such produce shall be so received; and where the duty shall be chargeable at different rates, so that the same cannot be paid at once but in succession, then the executor or administrator shall be chargeable with such duties in succession, in the same manner as such persons would be chargeable in case of immediate bequest; unless where the property bequeathed shall have been paid to or vested in any such trustees; in which case, the trustees or their representatives shall be chargeable with the duties in the same manner as if they were executors or administrators of the will in which the bequest was contained; and where any partial interest shall be given or shall arise out of any such property so to be enjoyed in succession, and such partial interest shall be satisfied by the person so enjoying such property, such person shall be chargeable with the duties in respect of such partial interest, and pay and retain the same accordingly, as

(*b*) *Barksdale* v. *Gilliat*, 1 Swanst. 562.
(*c*) 36 Geo. 3. c. 52. s. 6. (*d*) Ib. sect. 8.

if he were executor or administrator of the will, and the persons so chargeable with duty shall be debtors to the King, and subject to the same penalties as if they were executors.(*e*)

Respecting the valuation of specific legacies see 36 *Geo.* 3. c. 52, sect. 22.

The executors and other persons chargeable with duties are not only authorized to deduct the duties, but also any expenses occasioned by the refusal of the legatees to allow such deduction. By the twenty-fourth section it is enacted, that if the persons taking upon themselves the execution of the will or administration of the effects of the deceased, or any other person by the Act made chargeable with duty, shall declare themselves willing, and offer to pay any pecuniary legacy or residue, &c. deducting the duty payable thereon, or offer to deliver or otherwise dispose of any specific legacy or property, part of any residue or personal estate, to or for the benefit of the persons entitled thereto, or to any trustees for such persons, upon payment of the duty, and the persons entitled to such legacy, &c. or the trustees for such persons, shall refuse to accept such offer, and to give a proper discharge for such legacy, &c. or so much as shall be offered to be paid or otherwise disposed of, then, although no actual tender shall be made, if any suit shall be afterwards instituted for such legacy or effects, respecting which such offer has been made the Court in which such suit shall be instituted shall order all the costs and expenses attending the same to be paid by the person so refusing, &c. and shall order such costs, &c. to be deducted and retained out of such legacy and effects, together with the duty payable thereon, as the Court shall see fit, &c.

C.—With respect to the time, at which such deductions and payments are to be made.

The executors, administrators, or other persons chargeable with the legacy duty are subjected to penalties if they pay or deliver the legacy, residue, or other property charged with duty, to the persons entitled, without a receipt in writing duly signed by the legatee, and stamped according to the specifications of the Acts; and no receipt will be available unless stamped;(*f*) and for the penalties see the Act.(*g*)

The receipt must be dated on the day of the signing, and if the duty be not paid by the executor, administrator, or other person chargeable therewith, within twenty-one days after the date of the receipt, a penalty is incurred of 10*l. per cent.* on the amount of the duty; and, if not stamped within three calendar months, a further penalty of 10*l. per cent.* on the amount or value of the legacy, residue, annuity, or other property chargeable with the duty.(*h*)

The receipts, however, may be stamped at the expiration of the three months, to make them available upon payment of the penalties.(*i*)

The Acts do not specify any time at which the executor or administrator must render his final or residuary account at the Stamp Office; for the obvious reason, that the peculiar circumstances of the property of the deceased would, in very many cases, preclude

(*e*) 36 Geo. 3. c. 52. s. 13. (*f*) 36 Geo. 3. c. 52. s. 27. (*g*) Ib. sect. 28.
(*h*) Ib. and sect. 29. (*i*) 48 Geo. 3. c. 149. s. 44.

the possibility of complying with any such restriction. But it becomes the interest of the persons entitled to the residue, to expedite the final settlement of the account, since the duty must be paid on the accruing profits and income of the effects of the deceased, from the time of his death to that of delivering the account and offering to pay the duty at the Stamp Office.

This point was settled in the case of the *Attorney General* v. *Cavendish*,(*k*) in that case Lord *F. Cavendish* died in *October*, 1803, and on the 20th of *July*, 1808, the defendant, as executor and residuary legatee, delivered in his residuary account of the testator's personal estate intended to be retained by him, and offered to pay the duty on the residuary estate, exclusive of the interest which had accrued since the testator's decease, 324*l.* less than it would have been had the duty been computed on the interest accrued. And it was decided, that the duty was payable on the interest accrued from the death up to the time of the delivering of the account.

It remains to offer a few observations on the subject of retainer under the Stamp Acts. And,

First, Where the executor or administrator retains a legacy or residue, &c. under the said Acts for his *own benefit*.

The statute,(*l*) so often referred to, enacts, that where the executor or administrator is entitled to any legacy, or to the whole or any part of the residue, he shall be chargeable, whenever in the due course of administration he shall be entitled to retain to his own use any part of the personal estate of the deceased, in satisfaction or discharge of his legacy, &c. and before such retainer, shall transmit to the Stamp Office a note containing particulars of such legacy, &c. so to be retained; and in case he shall neglect to pay the duty assessed by the commissioners, within fourteen days after the same ought to be paid, under the provisions of the Act, he shall forfeit treble the amount of the duty.

Secondly, Where the executor or administrator retains for the befit of *another*.

When the duty can, consistently with the enactments of the several Acts, and particularly of that last mentioned, be ascertained and paid by the executor or administrator, it is usual and proper to pay it when the legacy is retained, although the time of payment to the legatee has not arrived. And indeed the sixth section of the 36th of *Geo. 3.* seems to contemplate such retainer; and the executor, it should seem, is liable to be called upon for it, since, from the time of retainer it becomes a debt to the Crown, although no penalties seem to accrue until after payment of the legacy to the legatee.

If, for instance, a legacy of 1000*l.* is given to the executor upon trust to pay it to *A.* at twenty-one; the executor, upon delivery of his final account, may, it should appear, pay the duty at that time, or he may retain it, and account for it as retained: If he pay it then, of course, all the accruing interest would from that time belong to the legatee, and no more duty would be payable; but if he retain it, and no duty is paid until *A.* attains twenty-one, the duty must be paid on the interest accrued from the death of the testator to the time of payment;(*m*) and no penalties would be incurred unless the

(*k*) 1 Wighw. Rep. 82. (*l*) 36 Geo. 3. c. 52. sect. 35.
(*m*) Upon the principle of *Att. General* v. *Cavendish*, 1 Wighw. 82. above.

executor, after payment of the legacy, neglected paying the duty within the time prescribed by the Acts.

In the case last supposed, it is at the option of the executor to pay the legacy into the Bank with the privity of the Accountant General, according to the provision of the statute.(*n*)

In cases where the duty cannot, according to the terms of the Acts, be paid upon the delivery of the executors or administrators final account at the Stamp Office, exceptions are made in the general statement in that account of the legacies *retained;* and the duties must in such case, be paid when the period arrives at which, according to the Acts, the duty is payable. The penalties, however, do not accrue until after payment to the legatee.

By way of illustration, let us suppose a legacy given to or upon trust for *A.* testator's sister, for life, after her death to *B.* testator's child, for life; and after the death of *A.* and *B.* to *C.* a stranger, absolutely; and *A. B.* and *C.* are infants, and the legacies directed not to be paid until twenty-one. In this case, the duty payable at different rates must, according to the Act, be paid by *A.* and *B.* as if the interest of each were an annuity, by four instalments; and upon that of *C.* when he comes into possession.

The executor, upon making up his final account cannot, or admitting that the duty might be then computed, he is not obliged, then to pay the duty on the legacy, but only to account for it as retained. When *A.* attains twenty one, the duty must be paid on his life interest by four instalments, according to the Act; and after his death, by *B.* in like manner; and after the death of *A.* and *B.* by *C.* within the period prescribed by the Acts, after the receipt of the principal.

We proceed to consider,

7. Retainer by executors or administrators *generally.*

Where a person entitled to a legacy is indebted to the testator, the executors may retain such legacy, either in part or full satisfaction of the debt, by way of set-off.

Thus in *Jeffs* v. *Wood,*(*o*) *Jeffs* by his will gave 500*l.* to his nephew *Wood* the defendant; and appointed the plaintiff, his son, executor and residuary legatee. *Wood* sued the plaintiff in the Spiritual Court, for his legacy, and the plaintiff filed his bill against *Wood* the defendant, and, after the bankruptcy of *Wood*, against his assignees, claiming an allowance out of the legacy for monies which the bankrupt legatee owed to the testator, and likewise to the plaintiff the executor. It was determined by Sir *Joseph Jekyll*, M. R. that the assignees were only entitled to so much of the legacy as remained, after deducting what was due to the testator, and to the executor.

In the recent case of *Ranking* v. *Barnard*, and others,(*p*) a similar decision was made by Sir *John Leach*, V. C. In that case, *Sarah Grave*, who died in 1815, bequeathed a legacy of 1000*l.* to *K. F. Ansley* the wife of *John Ansley.* The executors, *Barnard* and *Earnshall*, two of the defendants, proved the will in *March* 1816. Before the legacy was paid, *Ansley* became bankrupt, and the

(*n*) 36 Geo. 3. c. 52. sect. 31. *ante*, p. 591.
(*o*) 2 P. Will. 129.
(*p*) 5 Mad. 32.

plaintiffs were chosen assignees. Before the legacy had been paid, *K. F. Ansley*, after appointing by will (in exercise of a power) *B. A. Ansley* and *E. R. Comyn*, two other of the defendants, her executors, died in 1817. The assignees filed their bill against the executors of *Sarah Grave*, for the legacy to *K. F. Ansley:* The executors, by their answer, stated that *John Ansley*, before and at the issuing of the commission, was indebted to the testatrix *Sarah Grave* in the sum of 27,000*l.*; and that, as *Ansley* was entitled in right of his wife to the legacy of 1000*l.* they were authorized to set off the same, as far as it would extend, or retain the legacy of 1000*l.* Sir *John Leach*, after noticing the case of *Jeffs* v. *Wood*, observed, that the legatee having died without making any claim to a provision out of the legacy, it was discharged of her equity, and the legacy would have become the absolute property of the husband, had there not been any bankruptcy; that against the husband, the executors of *Sarah Grave* would have a right to satisfy the legacy by writing off so much of the debt due to the testatrix; and they must have the same right against the assignees.(*q*) The bill was accordingly dismissed.

The preceding rule respecting the executor's right to retain the legacy, in satisfaction of the legatee's debt, must of course be taken with this qualification, that the testator does not manifest an intention, either in terms of the bequest or in other parts of the will, to remit the debt due to him by the legatee. The mere bequest of the legacy however is not of itself sufficient manifestation of such intention. See the last observations of Sir *Joseph Jekyll*, in the case of *Jeffs* v. *Wood*.(*r*)

The next subject for consideration is,

7. The *presumptive payment* of legacies.

Courts of Equity are never active in extending relief to stale demands, except upon very special grounds. Although the Statute of Limitations does not bind those Courts by express terms, so as to enable a defendant to plead it in bar to a suit for a legacy;(*s*) yet, for the sake of convenience, they have adopted its provisions by analogy, in many instances in which fraud made no ingredient. Upon this principle, it has been determined, that a legacy not demanded for forty years should be considered *primâ facie* as satisfied: but this presumption is not so absolute, as to support a demurrer to a bill for such a legacy; for the point of satisfaction is an inference, only arising from the length of time which has elapsed from the period the legacy became payable, and which may be repelled by clear, strong, and relevant evidence. If, then, the merits of the question were allowed to be decided in a summary way upon a demurrer, the legatee would be precluded from the opportunity of producing such testimony.(*t*)

A.(*u*) by his will charged all his estate generally with the payment of debts and legacies. The bill was brought by the second husband of a legatee, after her death, against those in possession of the estate. It was resisted on the ground of presumptive payment, arising from

(*q*) See also *Richards* v. *Richards*, 9 Price, E. R. 219.
(*r*) See also *Carey* v. *Goodinge*, 3 Bro. C. C. 110. (*s*) 2 Ves. jun. 571.
(*t*) 3 Bro. C. C. 633. 646. (*u*) *Jones* v. *Tuberville*. 2 Ves. jun. 11.

the length of time which had elapsed without any demand; which was above forty years; and because the representatives, both real and personal, and all the persons who could throw any light upon the question, were dead. The plaintiff, to rebut the presumption, proved that one legacy, of ten guineas, was not paid; and also offered to read the evidence of some bond-creditors, that the debts due to them were not paid. All the other evidence was hearsay. They excused the length of time, by alleging several infancies in those who had possession of the estate. Lord Commissioner *Eyre* remarked, that it was a presumption of fact in legal proceedings before juries, that claims the most solemnly established upon the face of them, would be presumed to be satisfied, after a certain length of time. He doubted as to the relevancy of the evidence, and concurred with Lord Commissioner *Ashhurst*, in thinking that the Court could not entertain their suit, which was brought forty years after the right accrued; but that since the original demand was plain, and there was no positive evidence that it was paid, though the presumption was that way, yet there was such foundation for the bill, as to make it not a case for costs.

In the case of *Pickering* v. Lord *Stamford*,(*x*) decided by Lord *Alvanley*, M. R. upon a claim made by the representative of one of the testator's next of kin, after a lapse of thirty-five years, to such parts of the testator's residuary estate as were secured upon real property, upon the ground that the disposition was void by the Statutes of Mortmain,—his Lordship acknowledged the propriety of the decision of the Lords Commissioners, in the case last stated, and said if the case before him had been that of a legacy, he would have been of opinion that a bar had arisen from the length of time which had elapsed, upon the ground of presumptive satisfaction.

And it should seem that twenty years would, by analogy to the Statute of Limitations, raise the presumption of payment of a legacy.

In the recent case of *Montresor* v. *Williams*,(*y*) which came before Sir *John Leach*, V. C. upon exceptions to the Master's report, one *Duval* (a lessee under a lease from the *Portland* family for ninety-nine years from 1765,) by his will charged his general estate with legacies; subject to which the lease passed to the son as executor and residuary legatee. *Duval*, the son, in 1808 granted an under lease, which, after various mesne assignments, came to *Wigan*, who obtained a further term of fourteen years from *Duval*, and then assigned the under lease to the defendant, who contracted with General *Montresor*, the plaintiff, for the sale of the leasehold premises and the furniture. Among other objections to the title referred to the Master, it was insisted, that the lease being charged with legacies, demands, in respect of these, might be made upon the purchaser. Releases were subsequently procured. When the cause came on upon the exceptions to the Master's report, his Honour said, "These releases are unnecessary. The vendor has no right to them. Even without them I should have held, that, where an executor twenty years after the death of the testator, sells a leasehold charged by the will with legacies, and no demand has during all

(*x*) 2 Ves. jun. 272. 4 Bro. C. C. 214.
(*y*) MSS. 1823. March 3, April 16, and May 7.

that time been made upon it, there was evidence that the charges had been paid."

But in the case of *Lee* v. *Brown*,(*z*) it was decided that a legatee might recover a legacy, though he had lain by for ten years without making any claim.

In that case, the facts of which are before stated,(*a*) *Edward Brown*, (the executor and defendant) insisted that the legacy of 100*l.* was satisfied, and stated that during the apprenticeship of the plaintiff, *William Brown* paid him eighteen guineas, besides declaring that he would afterwards give him 200*l.* to set him up in business. There was evidence of declarations by *William Brown*, that what he had advanced for the plaintiff was so done, as the legacy due to him; and the defendant admitted assets. The Master of the Rolls said, that the 200*l.* had not been received in satisfaction of the legacy, of 100*l.*; and the question then was, whether the Court ought to declare the plaintiff still entitled to his legacy, so neglected to be called for by him when he ought to have called for it; and expressing his disapprobation of the demand, his Honour observed, that he could not hold it satisfied, and decreed, that the defendant should pay the legacy of 100*l.* with interest from the time of filing the bill, at the rate of four *per cent*, but he gave no costs on either side.

We may here observe, that legatees will not be deprived of their legacies (as creditors would be of their debts) by not claiming them within the time limited by the advertisements published under a decree of the Court of Equity.(*b*)

SECT. III. Of the appropriation of Legacies of Money or Stock.

Although legatees are not entitled to receive the principal of their legacies before the time of payment arrives, yet where the legacies are not charged upon real estate,(*c*) they are entitled to have them either appropriated or secured, according to circumstances.

Little is to be met with in the books, upon the subject of the present section; and the practice of the Court of Chancery respecting it has not been uniform. But the cases, after stated and referred to, seem to authorize the following conclusions:

First, where a legatee has a *vested* legacy of sterling money or of stock, whether he is immediately entitled to receive the *whole* or only a *portion* of the interest or annual produce, until the time of payment of the principal arrives, he is entitled to apply to the Court of Chancery, to have the legacy separated from the bulk of the testator's personal estate, and appropriated by investment in the *three per cent. consols* for his benefit, until the payment of the principal.(*d*)

Secondly, the same rule obtains, where the legatee takes only a vested life or other less estate in the produce of a legacy of money or of stock.(*e*)

(*z*) 4 Ves. 362, stated *supra*, p. 593. (*a*) *Ante*, 593. (*b*) Anon. 9. Price, 279. (*c*) *Gawler* v. *Standerwick*, 2 Cox, Ch. Cas. 15. *supra*, p. 436. (*d*) *Green* v. *Pigot*, 1 Bro. C. C. 103, *infra*, p. 612. *Carey* v. *Askew*, 2 ib. 59. *infra*, p. 613. (*e*) Ib. and see *Webber* v. *Webber*, 1 Sim. & Stu. 311.

So also *Thirdly*, where the legatee is entitled to a vested legacy of money or stock, subject to the life interest of another person.(*f*)

Fourthly, where a legacy in *sterling money* is given on a contingent event, and not any interest payable in the meantime, there the legatee cannot have the legacy separated from the bulk of the testator's estate, and, strictly speaking, *appropriated*, because it cannot be ascertained what sum of stock will, at the time of payment, produce the exact amount of the legacy in sterling money; and in such cases it is the practice of the Court of Chancery to order the fund to be paid to the person entitled to the residue, he giving *real security* to the legatee for the payment, when the contingency happens.(*g*)

Fifthly, the same rule seems to apply, for the same reason, to a legacy of *sterling money vested*, but not payable until a *future* day, and not any interest payable in the meantime; as where a legacy is given to *A.* ten years after testatrix's death, as in the case of *Ferrand* v. *Prentice*.(*h*) But where *security* cannot be given, or is refused, the only alternative seems to be to have the money paid into the Bank, or, in other words, invested in the *three per cents*.(*i*)

But, Sixthly, where a contingent or future legacy is given, *not in sterling* money, but in *stock*, and although not any interest is payable in the meantime, there, it should seem, the rule is otherwise, and an appropriation will be directed; because the reason against appropriation, before stated in respect of a legacy of sterling money, does not apply, since the actual *amount* of the stock does not vary, though its market *value* be subject to fluctuation.

To proceed with the cases.

In *Green* v. *Pigot*,(*k*) *A.* in 1775 devised to the defendants all his real estates, in trust to sell and stand possessed of the money to arise by such sale, and of the rents and profits in the mean time; and he also gave to them his personal estates, upon trust to pay his debts and funeral expenses, and subject thereto to pay legacies amounting to 40,000*l.* and (among them) to the plaintiff a legacy of 5000*l.* He directed the legacies to be paid to the respective legatees, being males, at twenty-one, and, being females, at twenty-one or marriage, which should first happen, with interest in the meantime not exceeding four *per cent. per annum*; and if the legatees, being females, should die before twenty-one or marriage, or males, before twenty-one, then he directed that the legacies should fall into the residue, which he gave to the defendant and his sister. The testator died in 1777, leaving the defendants, Sir *R. Pigot*, his eldest brother and heir; and the defendants proved his will. In 1780 the plaintiff (by *W. Green* her father and next friend) filed her bill against the defendants, to have the legacy of 5000*l.* paid into the bank of *England* in the name of the Accountant General, with interest at four *per cent. per annum*, from the death of the testator, till such payment should be made, to be placed out in proper

(*f*) *Pullen* v. *Smith*, 5 Ves. 21. *infra*, p. 614. *Holland* v. *Hughes*, 3 Mer. 685. *infra*, p. 614. *Houghton* v. *Franklin*, 1 Sim. & Stu. 390.
(*g*) *Webber* v. *Webber* *Ubi supra.* (*h*) Amb. 273.
(*i*) *Ferrand* v. *Prentice*, stated in *Green* v. *Pigot*, 1 Bro. C. C. 105.
(*k*) 1 Bro. C. C. 103.

funds, or to have the same secured for her benefit, and that the interest of the legacy might accumulate for her benefit till she married or attained twenty-one, and in the mean time for a proper allowance out of such interest for her maintenance and education. The defendants, by their answer, admitted assets; and the cause coming on to be heard before the Master of the Rolls, he referred it to the Master to compute interest on the legacy at four *per cent.* from the end of one year after the testator's death, and ordered that the produce should be laid out in the purchase of Bank three *per cent.* consolidated annuities, in the name of the Accountant General, upon the trusts and subject to the contingencies in the testator's will. From this decree, there was an appeal to Lord *Thurlow* (Chancellor;) who, after noticing the early cases, remarked, that they went to prove, that where a legacy is to be paid, it must be secured. He did not see a distinction as to its being contingent or merely future. If a legacy be payable at twenty-one, and the child die, his executor cannot claim till the time when the child would have arrived at twenty-one, if the legacy does not bear interest; but, if it be with interest, he may claim immediately. If it bear a less interest than the utmost use, the executor had a right to the use of the money, paying the modified interest; *Chester* v. *Painter*;(*l*) here, he did not incline to alter the decree at the Rolls. The legacy was to a child, payable at twenty-one, with four *per cent* interest, which was the ordinary interest given by the Court. If the interest had been severed from the principal, he must order that to be secured. Giving interest even at two *per cent* vested the principal. Whether the legacy were payable at a fixed or a contingent future day, the effect was the same: he must secure the interest of the fund. If the interest had been secured as an allowance, he must secure a fund equal to it. The Master of the Rolls had done right in ordering it to be laid out in the funds; but if it should produce more than four *per cent*, who was to have the surplus? He might order it to be paid to the executor. But should it produce less, could he order the executor to make it up? no; he thought therefore the produce must be to the use of the infant. Decree affirmed.(*m*)

In the case of *Sitwell* v. *Bernard*,(*n*) Lord *Eldon* says, "In the appropriation as to legacies it would be fit to consider, whether the necessity of appropriating may not give the legatees a larger interest than is given by the will, upon *Green* v. *Pigot;* but there have been other cases since, in which it has been held not to be the legitimate effect of appropriation, to give a larger interest than if there was no appropriation."

Again, in the case of *Carey* v. *Askew*,(*o*) *B.* bequeathed to the plaintiff 15,000*l.*, to be paid at twenty-one or marriage, with interest in the meantime; but if she died before, the legacy was to sink into the residue. The question was, whether the legacy should be appropriated, and interest paid, or whether interest should not be raised until the legacy was payable? The Master of the *Rolls* said,

(*l*) 2 P. Will. 336, *supra*, 583.

(*m*) See also *Rock* v. *Hardman*, 4 Madd. 253. and *Webber* v. *Webber*, 1 Sim. & Stu. 311.

(*n*) 6 Ves. 543.

(*o*) 2 Bro. C. C. 59.

that if there had been no directions as to the interest, the law was, that where a parent gave a legacy to a child unprovided for, the child should have interest from the day of the parent's death; but in the case then before him, the interest must pass by the very words of the will. He thought the money must be immediately raised, although the child might not live to attain twenty-one, or be married; and his Honour referred to the last case.

To illustrate the second and third rules, before stated, where a previous life estate is given in the legacy:

In *Pullen* v. *Smith*,(*p*) *Rowland Fuller* by his will gave to his niece *Ann*, wife of *Edward Pullen*, an annuity of 30*l*. a year for her life, for her sole and separate use; and he directed his trustees and executors, out of his personal estate, to purchase so much stock in the three *per cents* as would pay the said annuity, and to cause the same to be transferred into their own names for that purpose; and after the decease of the said annuitant, he gave the principal sum which should have been laid out for securing the said annuity, to the eldest son of such annuitant; and, if there should not be a son, to the daughter or daughters in equal shares, if more than one, and he directed the interest to be applied for maintenance: the testator then devised to the defendant and two other persons and their heirs, certain real estates, upon trust to sell; and he declared that the net money to arise by sale of his real estates should be considered as part of his personal estate, and he appointed the trustees his executors.

After the death of the testator, the bill was filed on behalf of the only child of *Ann Pullen*, an infant, against the trustees and the parents of the plaintiff, praying, in the usual manner, that the trustees might either admit assets sufficient to purchase so much stock as would produce an annual income sufficient to answer the annuity, or that an account might be taken of the testator's personal estate, debts, &c. and, if necessary, an account of the rents and profits of his real estates received by the said defendants; and that the will might be established, and the estate sold with the necessary consequential directions. The executors, by their answer, stated, that there was then standing in their names, upon the trusts of the will, a very considerable sum in the three *per cents*, and the whole dividends and interest arising therefrom had always, since the decease of the testator, been half yearly paid and divided among the persons entitled, as the defendants believed, to the satisfaction of *Ann Pullen* and her husband, who had never requested any separate appropriation for such annuity; but nevertheless the defendants thereby consented to transfer 1000*l*. three *per cents*, part of the said stock, as a specific appropriation to secure such annuity, and the legacy to the plaintiff. The exceptions taken in the answer were over-ruled; and the counsel for the defendants consenting, an order was made as upon a motion, that the executors admitting assets sufficient for payment of the annuity and legacy, might transfer 1000*l*. three *per cents* into the name of the Accountant General, to that account.

In *Holland* v. *Hughes*,(*q*) *William Holland*, of *Calcutta*, by his will duly executed, &c. bequeathed to *Rebecca* his wife 50,000 sicca

(*p*) 5 Ves. 21. (*q*) 3 Merivale, 685. *S. C.* 16 Ves. 111.

rupees for her life, to be raised out of the bulk of his property; and after her death, he gave the said principal money to be equally divided among his children by his said wife, who should survive her, and for failure of children, to the said wife absolutely. And after giving several other legacies, he gave all the residue of his estate, real and personal, to his wife for life, and after her death, to his children as before, and appointed his wife and *Samuel Holland* (one of the plaintiffs) his executrix and executor, and guardians of his children. The testator died, leaving his wife and one only child (the infant plaintiff) by his marriage with her. The wife alone proved the will in *India*, and collected the estate; and after retaining the legacy of 50,000 sicca rupees, (which she placed out at interest in *India*,) and after payment of the testator's debts, and the other legacies given by his will, invested the clear residue, amounting to 100,000 sicca rupees, in *India* bonds, the interest of which, as well as of the 50,000 legacy, she received to her own use, and afterwards came to *England* with her child (the infant plaintiff,) leaving her agent in *India* to collect and receive any outstanding property of the testator's there, and to remit the interest to her in *England*. The other plaintiff (who was the executor named in the will) proved in *England*, and instituted the suit in the names of himself and the infant, against the widow (who had subsequently married again) and her husband, for an account and administration to have the amount of the property ascertained, and all outstanding parts of it called in and remitted to *England*, and laid out and invested under the authority of the Court. It appeared that the 50,000 sicca rupees legacy, and also the residue of the estate, so far as it was collected, had been invested on securities, yielding a rate of interest much more considerable than that afforded by the public funds of this country; and upon the question being raised, Sir *William Grant*, M. R., was of opinion, that the widow was not compellable to refund the excess of the interest which she had hitherto received above that which would have been produced had the property been immediately invested in the *English* funds, but that the infant plaintiff, being in this country, had a right to have the property remitted, and invested in the three *per cents.* in the name of the Accountant General, which was ordered accordingly.

The fourth rule was acted upon in the recent case of *Webber* v. *Webber*;(*r*) and the fifth and sixth seem to follow from the determination. In that case *William Webber* gave to each of his daughters 10,000*l.* on their respective marriages, and after the death of their mother, an annuity of 1200*l.* equally while they continued unmarried, and after the death or marriage of either, the survivor after the death of the mother was to have an annuity of 800*l.* in lieu of her moiety of the annuity of 1200*l.* so long as she continued unmarried. One of the daughters married in testator's lifetime: after his death a suit was instituted for the administration of the testator's personal estate; and the Master reported all the debts and legacies paid, except the 10,000*l.* given to the unmarried daughter *Mary;* and that 16,000*l.* three *per cents*, part of the funds in Court, were, according to the market price of such stock on that day, mentioned in the re-

(*r*) 1 Sim. & Stu. 311.

port of the value of 10,000*l.* That sum was carried to Miss *Webber's* account, subject to the contingencies in the will concerning her legacy. The widow died; and upon the petition of Miss *Webber*, insisting that she was, in the events that had happened, entitled to an annuity of 800*l.* an order was made, directing two sums of 13,333*l.* three *per cents*, part of the funds in Court, to be appropriated to answer the annuity. Upon the petition of other parties to have the sum of 16,000*l.* carried over from Miss *Webber's* account to the credit of the cause generally, and that the two sums of 13,333*l.* might be declared to be a fund for answering both the annuity and legacy, as Miss *Webber* never could be entitled to both the annuity and legacy: Sir *John Leach*, V. C. observed, that the legatee being entitled to receive a certain sum *in money*, when the event of her marriage happened, her legacy was not capable of being *secured* by the present *appropriation* of any sum of stock. And he decreed, that the residuary legatee should receive the whole fund in Court, upon giving security, to the satisfaction of the Master, for the payment of the legacy, if the event happened: and that the legacy might be *secured upon land*, if the residuary legatee had land, or by a *loan of money* upon land.

When the appropriation is made *in pais* by the executors or trustees, the whole sum must be properly invested, and they must proceed in the same manner as the Court of Chancery would, if a suit had been instituted to have the legacy secured, in which case the appropriation will be good; but if they act otherwise, they will not be indemnified in making the appropriation, although they may have acted *bonâ fide*.

In *Cooper* v. *Douglas*,(*s*) *A.* bequeathed 4000*l.* to his cousin *S. Cooper*, a co-plaintiff with her husband, to be paid within three months after her marriage; and until such marriage, interest should be paid to her at 3*l. per cent.*; and appointed *E. Wine* executrix. In 1767, the executrix invested 4000*l.* in the purchase of 4440*l.* stock, and conveyed the same to trustees, in trust to pay *S. Cooper* 4000*l.* with interest at 3*l. per cent.*, and the surplus interest to her, the executrix. The legatee afterwards intermarried with the co-plaintiff *Cooper*, and the stock turning out not equal in value to the 4000*l.*, they filed the bill, stating the marriage and a settlement previous to it, and that the stock purchased was not equal in value to the legacy, and praying that *Gibbons*, the husband of the executrix, who was then dead, might pay to the trustees in the settlement, the difference between the present value of the stock purchased, and the 4000*l.* legacy. The question was, whether the laying out the money in the funds and conveying the same to trustees for the benefit of the legatee, was a valid appropriation, binding upon the plaintiffs? And it was decreed, that the stock purchased should be transferred to the Accountant General, in trust, in the cause, in part satisfaction of the legacy of 4000*l.*; and it was referred to the Master to take an account what would remain due to the plaintiffs after such transfer, for principal and interest of the said legacy. The Master made a report, and the cause stood over, in order that it might be re-heard on the point of the validity of the appropriation. The *Lord Chancellor*

(*s*) 2 Brown, C. C. 232.

(*Thurlow*) said, The question was, whether the legacy had been taken out of the testator's property? The uses declared by the deed had been expressly to pay the legatee 4000*l.* with interest at 3*l. per cent.*, and to pay the residue of the interest to the executrix. If a legatee had the legacy anticipated, he must stand or fall by it; but then he must have the *whole* sum. When the Court appropriated a legacy, it ordered a sum equal to the legacy to be laid out; but he (Lord *Thurlow*) did not remember any case, in which the Court had done so, and given any part of the intermediate interest to another person. The executrix could not take the surplus interest. The money must remain in Court, subject to the application of the parties, and it must be referred to the Master, to inquire into the settlement, and to whom it should be paid.

In *Hutcheson* v. *Hammond*,(*t*) *Frances Hutcheson*, in exercise of a power reserved to her in her marriage settlement, by her will appointed trustees to sell certain estates, and after certain deductions, to lay out the residue of the money in the funds, and to permit her husband *William Hutcheson* to receive the interest for his life, and after his death to pay to the plaintiff, *Ann Jones*, in certain events (which happened) three sums of 1500*l.*, 1500*l.* and 500*l.*; and she appointed her husband, *William Hutcheson*, executor and residuary legatee. By a codicil, the testatrix declared, that if *Ann Jones* should marry in the lifetime of *William Hutcheson*, without his consent, then the three sums should go according to the appointment of *William Hutcheson*. After the testatrix's death, the trustees sold the estate for 6500*l.* and after certain deductions, a residue of 6252*l.* 6*s.* 2*d.* remained in their hands. They invested 2695*l.* in the purchase of 4900*l.* three *per cents*, but kept back 3500*l.*, to be invested, to answer the amount of the legacies given to *Ann Jones*, subject to her father's life interest, in case they should be justified in so doing. The plaintiff, *William Hutcheson*, made several applications to *Peter Hammond*, the acting trustee, to invest the 3500*l.* in the funds; and the result was, that it was laid out in the purchase of 6400*l.* three *per cents*, of which notice was given by *Hammond* to *Hutcheson*, but not any declaration of the trusts was made. The plaintiffs, *P. Jones* and *Ann Jones* intermarried, she having first duly obtained in writing the consent of her father. By settlement made prior to the marriage, it was agreed, that their proportionable share of the stock should be assigned to trustees, to the uses of the marriage. The bill, among other things, prayed it to be declared, that the trustees of the marriage settlement of *P. Jones* and *Ann* his wife, were entitled to the three *per cent.* annuities, purchased with the 3500*l.* upon the trusts of such settlement, and that the stock might be transferred to them. Judge *Buller* stated the question to be, first, whether the sum could have been appropriated by the trustees? And if so, secondly, whether what had been done amounted to an appropriation? And thirdly, if it could be then paid to the trustees of *Ann Jones's* settlement? And he decided that, even in contingent interests, any person interested might come and have the fund appropriated; and that if the Court would have appropriated the fund, the trustees were justified in doing it, without its intervention; and

(*t*) 3 Bro. C. C. 128. 144.

that, in that case, the trustees had made the appropriation; and that it might then be paid to the trustees of *Ann Jones's* settlement, with the consent of the father. The cause was re-heard before Lord *Thurlow*, who affirmed the decree.

In the case of *Hancom* v. *Allen*,(*u*) the bill was, to have some trust money laid out pursuant to the trusts *of a deed* bearing date 1740. The trust money had been laid out by the trustees, in the funds, which sunk in their value, without any *mala fides;* but the same not being laid out in the funds in which the Court directs trust money to be laid out, the trustees were ordered to account for the principal, and to pay it into the Bank, and then that it should be laid out in Bank three *per cent.* annuities.

In the last case, that of *Trafford* v. *Boehm*,(*w*) before Lord *Hardwicke*, was cited; in which a trustee laid out trust money in the South Sea annuities, which afterwards sunk in their value. It was considered as a departure from the trust, and the Lord Chancellor ordered the deficiency to be made up; and as to the manner of making it good, he observed, that it must first come out of the estate of a *cestui que trust*, who consented to the investment; the rule of the Court being, that if a trustee err in the management of the trust, and is guilty of a breach, yet if he goes out of the trust with the approbation of *cestui que trust*, it must be made good first out of the estate of the person who consented to it. See also the case of *Adie* v. *Fennilitteau*, in note to the last case.(*x*)

In *Peat* v. *Crane*,(*y*) before Lord *Thurlow*, C. the trustee laid out trust money in three *per cents.*, the fund the Court adopts with a view to benefit the trust, so that it might not lie unproductive. The three *per cents.* afterwards sunk in their price; the trustee claimed an allowance for what he had so laid out. His Lordship at first doubted as to making the allowance, but after consideration, was clear he was entitled to an allowance, according to the price at which the annuities were purchased.(*z*)

As to the effect of appropriation upon the fund itself.

When the appropriation is once duly made, whether by the direction of the Court or by the executors or trustees *in pais*, according to the rules of the Court, the rule appears to be, that the legatees entitled to the legacy for which the appropriation was made, must take it subject to its chances of fluctuation. For example, in the case of *Burgess* v. *Robinson*,(*a*) the facts of which are before stated,(*b*) the testator gave three legacies of 200*l.* each to his three nephews, in the event of their claiming them within three years, in the manner therein specified; and in the event of their not making such claim, he directed that 500*l.* part of the said three legacies should sink into the residue of his personal estate; and he gave the residue to his wife the plaintiff, and appointed the defendants executors of his will. When the case came on for further directions, it was decreed, that the 500*l.* should be raised out of the estate, with

(*u*) 2 Dickens, 498. (*w*) 3 Atk. 440.
(*x*) Reported in 1 Cox. 24. as *Adye* v. *Feuilleteau*.
(*y*) Note by Dickens to the case of *Hancom* v. *Allen*.
(*z*) And see *Franklin* v. *Frith*, 3 Bro. C. C. 434. 1 Cox, 24. 3 Dow. 128. *Howe* v. Lord *Dartmouth*, 7 Ves. 151. *Holland* v. *Hughes*, 16 Ves. 114.
(*a*) 3 Mer. 7. (*b*) p. 515.

interest at 4*l. per cent.* from the end of three years after the death of the testator. It afterwards appearing that the 500*l.* had already been paid into Court, and laid out in the purchase of stock, in pursuance of an order made on the motion of the defendant, the cause was again spoke to, on the minutes. The plaintiff claimed to be entitled to the stock and the dividends which had accrued thereon, and likewise to interest at 4*l. per cent.* upon the principal sum of 500*l.* from the expiration of three years after the testator's death to the time of the investment; the defendant, on the other side, representing that as the money had been so paid in and invested upon his application, the plaintiff not having appeared or consented thereto, he (the defendant) would have been liable to make good the principal sum, in case of loss by the fall of stock, and ought therefore to be held entitled to the advantage which had accrued from their rise subsequent to the investment; insisting, consequently, that the stock ought to be sold, and that, out of the produce thereof, together with the dividends accrued due thereon, the plaintiff should be paid the 500*l.* with interest as aforesaid. But Sir *William Grant* held, that the investment of the money was an appropriation, by which all parties were bound, and therefore that the stock belonged to the plaintiff.(*c*)

The recent case of *Davies* v. *Wattier*(*d*) may be here noticed, which at first sight might appear at variance with the rule last stated; but it was decided upon the general construction of the will. *John Beard*, by his will, gave his wife *Lydia Beard*, 200*l.* a year for her life, and bequeathed *the residue* of his personal estate to the defendants *Wattier*, *Goldicutt*, and *Thomson*, to invest it in the funds, and pay thereout, in the first place, the annuity to his wife; and he directed them to divide the residue of the dividends equally among his nephews and nieces living at his death, and after his wife's death to transfer the principal to such of his nephews and nieces as should be then living; and he appointed the defendants his executors. By a decree made at the hearing, the executors were ordered to transfer 4000*l.* navy five *per cent.* annuities, and 5300*l.* three *per cent.* Bank annuities, unto the name of the Accountant General, in trust, &c.; and out of the dividends to pay the annuity of 200*l.* from time to time to the widow. The funds were transferred accordingly. On the hearing for further directions, the interests of some of the other parties to the suit were declared in a sum of 4849*l.* 14*s.* 8*d.* Bank three *per cents*, standing in the Accountant General's name, which appears to have been the residue of the 5300*l.* Bank three *per cents*, after costs had been deducted; and the dividends of the sum of 4849*l.* 15*s.* 8*d.* Bank three *per cents* were directed to be paid to them accordingly. By the 3 *Geo.* 4. *c.* 9. the navy five *per cents* were converted into new four *per cents*, and the sum of 4000*l.* navy five *per cents* was converted into 4200*l.* new four *per cents*. The dividends thus being insufficient to meet the annuity, Mrs. *Beard* petitioned that the deficiency might from time to time be made up out of the dividends of the sum then in the three *per cents*; the petition was opposed, on the ground, that the sum of 4000*l.* five *per cents* being *appropriated* with Mrs. *Beard's*

(*c*) See also *Green* v. *Pigot*, 1 Bro. C. C. 105. *Rock* v. *Hardman*, 4 Madd. 253.
(*d*) 1 Sim. & Stu. 463.

consent for securing her annuity, she must abide by the loss occasioned by the conversion into four *per cents*. Sir *John Leach*, V. C. said, that the appropriation of the 4000*l.* five *per cents* was not the act of the petitioner, but was the act of the Court, and that as the annuity was a charge upon the whole of the *residue*, the petitioner was entitled to have the deficiency, which had been occasioned by the conversion of the stock, supplied out of the other funds in the cause.

The Reader will observe, that the nephews and nieces were by the will entitled only to *the residue* of the produce of the testator's personal estate, *after payment* of the annuity; and upon this ground the decree in favour of the annuitant was made.

But where an investment in the funds is directed of a legacy, and the trustee, after retainer or receipt of the legacy, fails to invest the legacy in stock, he must suffer for his neglect; and in case of increase in the value of the funds in which the legacy is to be invested, he must nevertheless purchase so much stock as the legacy would have produced at the period of retainer or payment.

Thus in the case of *Byrchall* v. *Bradford*,(*e*) an executor was constituted a trustee as to a legacy of 1200*l.* He accounted for the residuary estate, and retained the amount of the legacy. The will directed it to be invested in the funds; and the question in the cause was, whether the *cestui que trust* of the legacy were now entitled to claim against the executor as much stock as the 1200*l.* would have produced, if invested at the time of the settlement with the residuary legatee.

The stocks had risen in the meantime, and the executor had never invested the legacy.

Sir *John Leach*, V. C. observed; "Generally speaking, this Court does not enter into the consideration whether the executor could or not at an earlier period have invested a stock legacy, but directs it to be invested by its decree. But in the particular case, this executor was in the situation of another trustee, to whom a legacy is paid upon trust to invest it. His retainer, after accounting for the residuary estate, is equivalent to the payment of another trustee. If the *cestui que trust* sustained a loss by the trustee neglecting his duty to invest, he has a right to charge the trustee with the loss."

In this case, however, it was suggested, that the *cestui que trusts*, who were all of age, had consented to the delay of investment, and Sir *John Leach*, V. C. directed an inquiry as to that fact.

CHAPTER XV.

Of marshalling Assets in favour of Legatees.

Where a person dies, leaving assets subject to various claims, it is an object of equitable jurisdiction to make such an arrangement in the distribution of those assets, consistently with the nature of the respective claims, as shall best satisfy the just demands of all claimants: consequently it has been a rule of the courts of equity, in the exercise of this jurisdiction, that where one claimant has *more*

(*e*) 6 Mad. 13.

than *one* fund to resort to, and another claimant only *one*, the former claimant shall resort to that fund upon which the latter has not any lien.(*a*) Consistently with this rule, it is settled, that where a *specialty* creditor, whose debt is a lien on the *real* assets, receives satisfaction out of the *personal* assets, a *simple contract* creditor shall stand in the place of the specialty creditor, against the *real* assets in satisfaction of his debt.(*b*) A similar exercise of jurisdiction is extended to *legatees;* but before they can claim the advantages resulting from this equitable administration, certain preliminaries are requisite: The real estate must be charged with *debts*, or with the payment of one or more *legacies;* or, where there is not any such charge, the creditor must have a *specific lien* upon the estate; or if there be not any such charge or specific lien, yet where the real estate *descends* to the *heir*, the legatees will be permitted to throw the general bond debts, which are only a *general lien*, upon the realty, in exoneration of the personal estate. But where the real estate does not *descend* to the *heir*, but is *devised*, the rule is otherwise. In administering this equity, certain other subordinate rules are adopted by the Court, which it is here unncessary to anticipate. It is therefore proposed to discuss the doctrine of marshalling Assets, so far as it respects *Legacies*, under the following heads:

SECT. I. The marshalling of assets in favour of legatees.
1.—*Where the real estate is devised subject to payment of* debts.
2.—*When subject to a charge of one or more* legacies.
3.—*When charged with* both debts and legacies.

SECT. II. The marshalling of assets in favour of legatees, where the real estate is *not* charged by the will with debts or legacies, but there is a *specific lien* on the real estate. And
1.—*Where that real is* devised.
2.—*Where it* descends.

SECT. III. The marshalling of assets in favour of legatees, where the real estate is neither charged with debts nor legacies, nor subject to a specific lien, but there is *merely a general* lien on the real estate, which *descends* to the *heir*.

SECT. IV. Exception, where the estate is devised; for where the real estate is neither charged with *debts* nor *legacies*, nor subject to a *specific lien*, but there is only a *general lien*, and the real estate is specifically devised to a stranger or to the *heir* taking as a devisee, assets are not marshalled in favour of a *general* legatee; but the rule appears otherwise in favour of a *specific* legatee. *s. q.*

(*a*) *Lanoy* v. Duke of *Athol*, 2 Atk. 446.
(*b*) *Galton* v. *Hancock*, 2 ib. 436. *Lacam* v. *Mertins*, 1 Ves. sen. 312.

Sect. V. The extent to which equity will permit legatees to stand in the place of specialty creditors.

Sect. VI. The consideration of those legatees for whom a Court of Equity *will not* marshal assets.

1.—*Where the legatees, at the time of their legacies becoming due, have not an established claim*, &c.

2.—*Where the legacies are given to charities.*

3.—*The rule respecting contribution between charities and the next of kin, where the residue is given to charities, and part of the disposition, being within the Statute of Mortmain, fails for the benefit of the next of kin.*

Sect. VII. The mode in which *equitable* assets are distributed among legatees.

Sect. I. Assets marshalled in favour of legatees.

1st.—Where the real estate is charged with the payment of *debts.*

In the case of *Foster* v. *Cook*,(*c*) *Henry Cook* being seised and possessed of freehold lands, leasehold and other personal estates, devised them to trustees, to pay an annuity to his wife during widowhood, and subject thereto, to and for the benefit of the child with which his wife was then pregnant (and which was afterwards still-born,) with remainder to his five cousins by name, in fee, if such child died without leaving issue. The testator, among other legacies, gave the plaintiff *Foster* 100*l.* and directed his trustees *to possess themselves of all his estates and substance*, and improve the same for the benefit of his said child, and to pay all his just debts, &c. The testator made a codicil to his will, and gave to his wife 20*l.* and another legacy; and in case of any overplus, after payment of all his just debts and legacies out of his stock and personal estates, he ordered it to be divided into two parts, and gave one moiety to his wife, and the other to the plaintiffs, over and above their legacies. The trustees filed the bill, praying, among other things, an account of the personal estate, and in case it should be insufficient to pay funeral expenses, debts, and legacies, that a sufficient sum might be raised out of the real estates to make good the deficiency. To this it was objected, that with respect to the charge of debts, there was not sufficient, in this case, to make a charge upon the real estate; it was only a discretionary power to raise out of the personalty sufficient to pay the debts; the testator clearly meant the personalty only to be liable; that there was no case, where the real estate had been devised, in which the Court had marshalled the assets. Lord *Thurlow*, C., observed, "With respect to the charge for payment of debts, he (the testator) directed the trustees to possess themselves of all his estate and substance, to pay debts; it is a most direct charge, and the legatees must come upon the real estate, so far as the personalty has been applied in payment of debts."

In the case of *Bradford* v. *Foley*,(*d*) *Tempest Hay*, after directing all his debts and funeral expenses to be paid, devised all his real

(*c*) 3 Bro. C. C. 347.

(*d*) 3 Bro. C. C. 351. note.

estates to trustees, to the use of his son for life, remainder to his first and other sons by any future marriage in tail male, with several remainders over. The testator, after giving divers legacies, directed the residue of his personal estate to be laid out in Government securities, in the names of his executors, to be settled and applied to the same uses as his real estates. By the decree upon the hearing of the case, the will was established; and it was, among other things, ordered, that the personal estate of the testator should be applied in payment of his debts, funeral expenses, and legacies, in a course of administration; and in case the personal estate should not be sufficient to pay his debts, funeral expenses, and legacies, it was declared that the real estate was subjected by the will to the amount of the debts and funeral expenses; that the whole or a sufficient part of the real estate should be sold, and the money applied in making good the deficiencies; and in case any of the creditors had received any thing out of the personal estate towards satisfaction of their demands, then they were not to receive any part of the money arising from the sale, till the other creditors were paid up equal with them. The estate had been sold, and the personal estate not being sufficient for payment of debts and legacies, they were ordered to be paid out of the money produced by the sale of the real estate.(*e*)

In the case of *Webster* v. *Alsop*,(*f*) *John Taylor*, by his will, directed all his just debts and funeral expenses to be paid out of his personal estate; and if his personal estate should not be sufficient, he charged his real estate with so much thereof as his personal estate would not extend to pay; and then devised his real estates to trustees, subject to annuities and other payments, to the use of the plaintiff for life, with the remainders over; and he gave several legacies. The personal estate proving deficient, it was declared that the legatees were entitled to stand in the place of the creditors, for so much of the personal estate as had been exhausted by them in the payment of their debts.(*g*)

It must be here noticed, that in *Keeling* v. *Brown*, Sir *Richard Pepper Arden*, Master of the Rolls, refused to confine the specialty creditors of the testator to the real estate disposed of by a general residuary clause, the personal estate being sufficient to pay all the debts, but not the legacies; although the Court, from the implied charge upon the land by the will, would have marshalled the assets for the simple contract creditors, if the personal estate had been sufficient to pay their demands. In that case(*h*) *Aaron Brown* began his will in these words, "*Imprimis*, I will and direct that all my just debts and funeral expenses be paid and discharged, as soon as conveniently may be, after my decease, by my executrix and executors hereinafter named. *Item*, I give, devise and bequeath to my nephew *J. Brown* all that my messuage, &c. wherein he now lives, at *H.*, and also the sum of 400*l.*, to hold to him, his heirs, executors, administrators, and assigns for ever." The testator then devised another house to his nephew *Charles* in fee, and gave another house

(*e*) See the fourth resolution in *Haslewood* v. *Pope*, 3 P. Will, 323.
(*f*) 3 Bro. C. C. 352. (note.) (*g*) See *Muddle* v. *Fry*, 6 Mad. 270.
(*h*) 5 Ves. 359.

to his wife for life, with remainder to *J. Brown* in fee. And after bequeathing specific parts of his personal estate to his wife, &c. and giving some pecuniary legacies, he gave the residue of his estate and effects, whether real or personal, to *J. Brown* absolutely, and appointed his wife, *S. Fernehough*, and *H. Hatton*, executrix and executors. The testator's personal estate being large enough to pay all the debts, but insufficient to answer the legacies, the question was, whether the assets should be so marshalled, as at least to confine the specialty creditors to the real estate in favour of the legatees? and the *Master of the Rolls* expressed a clear opinion, that there was no charge of the debts upon the real estate, but a mere direction to the executors to pay the debts, without giving them any other fund than the personal estate, out of which they could fulfil that duty. If any of the debts were to go unpaid by the insufficiency of the personal estate, he would certainly marshal the assets; making the real estate to pay as much of the specialty debts as would be necessary to obtain a fund from the personal estate for payment of the simple contract creditors: but there it was agreed on all hands, that it was not necessary for the payment of the debts of the testator to do so.

Then, there being no charge upon the real estate for payment of debts, and there being an ample fund of personal estate for the payment both of specialty and simple contract debts, he was clearly of opinion in that case, there was no fund but the surplus of the personal estate, if there should be any, after payment of all the debts of the testator. He could not marshal the assets for payment of the legacies. He had formerly fully expressed his opinion upon that point, as to the difference between debts and legacies. He understood the *Lord Chancellor* expressed some doubt of it in the case of *Williams* v. *Chitty*,(*i*) but, upon reflection, he *(the Master of the Rolls)* remained of the same opinion, and decreed an account of the personal estate, and of the debts, funeral expenses, and legacies; and if, after payment of all the debts, there should not be enough of the personal estate to pay all the legacies, the legatees must abate in proportion. There was no other fund for their payment.

It is observable in the last case, that the *Master of the Rolls* seems to have thought the introductory clause in the will was sufficient to charge the lands with the specialty debts in favour of simple contract creditors, but not in favour of the legatees, under the persuasion that the law required a stronger mark of intention to charge the real estate with legacies than with debts: and this interpretation of his words seems strengthened by his reference to his opinion expressed to that effect in *Kightley* v. *Kightley*, before stated and considered.(*k*) This distinction has, indeed, been questioned by Lord *Loughborough*, C. in the case alluded to by the Master of the Rolls; so that it seems this decision of his Honour, in *Keeling* v. *Brown*, cannot be entirely devested from doubt, while Lord *Loughborough's* opinion remains uncontrolled by equal authority.

2dly. Assets marshalled in favour of legatees, where the real

(*i*) 3 Ves. 551. (*k*) *Supra*, 455.

estate is devised subject to a charge for payment of one or more *legacies.*

In the case of *Hanby* v. *Roberts*,(*l*) *W. Roberts*, by his will gave several legacies to the defendant and others, and devised his real estates, in trust for two persons who were his heirs at law, and who by descent would take as co-parceners; and by a codicil, he gave, over and above the legacy in his will, another legacy of 3000*l.* to the defendant, which he directed his executors and trustees to pay; and charged all his real and personal estate whatsoever with the payment. The personal estate was exhausted in payment of the 3000*l.* legacy; and the question was, whether the other legatees should stand in the place of the 3000*l.* legatee, to be paid out of the real estate. Lord *Hardwicke*, C. decreed that they should. He observed that he saw no difference between that case and one where a person, indebted by a simple contract, having lands and personal estate, begins his will by charging all his estate with payment of his debts, and then, after giving general legacies, devises his real estate by way of specific devise. The simple contract creditors exhaust the personal estate; the Court would order the general legatees to stand in their place, and come upon the real. A second question was made, whether the lands and legacies should bear the burthen in proportion to their values? but the *Lord Chancellor* decreed there was no ground for it, nor was it the intention of the testator, nor was there any case where it had been done.

The same equity is exercised in marshalling assets among legatees, where some legacies are made effectual charges upon the real estate, and others are only charged on the personal estate.

Thus in *Masters* v. *Masters*,(*m*) *Mary Masters*, by her will, after giving several general and specific legacies, devised her real estate to her nephew and heir at law, the defendant, charged with the payment of her legacies above mentioned, and made him executor. The testatrix afterwards added a codicil to her will, and gave other legacies, which were not charged upon the real estate. It was decreed by Sir *Joseph Jekyll*, Master of the Rolls, that the personal estate not being sufficient to pay the legacies both by the will and codicil, and the real estate being liable to the legacies by the will, and not to those by the codicil, the estate should be so marshalled, that, as far as possible, the whole will might take effect, and all the legacies be paid. And therefore, that the legatees in the will should be paid out of the real estate; and if that should be deficient, as to the surplus, they should come in average with pecuniary legatees in the codicil, to be paid out of the personal estate; and that, there being admitted to be a deficiency, the land should be forthwith sold to prevent a greater deficiency.

In the case of *Bligh* v. *The Earl of Darnley*,(*n*) the defendant's father, the then late *Earl of Darnley*, having two sons and three daughters, gave by his will 8000*l.* a piece to his two eldest, and 6000*l.* to his youngest daughter, charging his real estate with the payment thereof. By a codicil, he bequeathed several general legacies of considerable value to his brothers and sisters, but without

(*l*) Amb. 127. This case appears to be the same as *Hamley* v. *Fisher*, reported by Dickens, 104. (*m*) 1 P. Will. 421. (*n*) 2 P. Will. 619.

charging them upon his real estate. Subsequently to the date of the codicil, he entered into a contract before the Master, for the payment of 17,000*l.* for a third of the manor of *Cobham Hall* in *Kent*. The Master reported him the best purchaser; and before his death, which happened soon after, the report was absolutely confirmed. The Earl's personal estate, before his entering into the contract for this purchase of the estate, was sufficient for the payment of all his legacies; but the performance of the contract would, as it was thought, occasion a deficiency of assets. The legatees in the codicil therefore prayed by their bill, that the assets might be marshalled, and the daughters legacies by the will paid out of the real estate; or if already recovered out of the personal estate, then that the plaintiffs might stand in the place of the daughters, and take so much out of the land for their legacies, as these had exhausted out of the personal estate; which the Court decreed as reasonable, and within the common rule of marshalling assets.

The same rule was adopted in the recent case of *Bonner* v. *Bonner*.(*o*) In that case *Thomas Bonner*, by will duly executed according to the statute of frauds,(*p*) gave legacies to his eldest son *Robert Bonner Warwick*, and to his daughters; and devised certain real estates to trustees for a term of one thousand years, and subject thereto, to his eldest son for life, and his first and other sons in strict settlement; and the trusts of the term were in the usual manner declared to raise and pay to his son and daughters the legacies "*hereby* bequeathed to them respectively, with interest for the same as aforesaid, as also the several other legacies *hereinafter bequeathed*." By a subsequent codicil, the testator gave to three of his daughters 800*l.* each, in addition to the legacies given by his will, and he directed his codicil to be considered as part of his will. The codicil was not altered. The question upon the bill filed by two of the daughters for their legacies was, whether those given by the codicil were charged upon the real estate, the personal estate being insufficient; and Lord *Eldon*, C. said the construction he was obliged to adopt was very unfortunate; but he could not make the declaration prayed by the bill, that the legacies bequeathed by the unattested codicil were charged upon the real estate. That was not a general charge of legacies, as *Hannis* v. *Packer*.(*q*) He could only marshal the assets; as Sir *Joseph Jekyll* did in *Masters* v. *Masters*.(*r*)

3dly. The following cases are instances wherein the real estate is devised subject to a charge both with *debts and legacies*.

In the case of *Burton* v. *Pierpoint*,(*s*) Mr. *William Pierpoint*, upon his marriage with Mrs. *Darcy*, settled his real estate on himself for life, remainder to his wife for life, remainder to the first and other sons of his marriage in tail male, remainder to his own right heirs. The testator having two sons by this marriage, and having a small estate in fee-simple, unsettled, devised his wife's jewels to her, and likewise the use of the plate to her for life; after which he devised all his real estate, subject to his debts and legacies, and after his debts and legacies paid, to his kinsman the Marquis of *Dorchester*; and in 1706, the testator died, leaving two infant sons. At the testator's

(*o*) 13 Ves. 379. (*p*) 29 Ch. 2. c. 3. (*q*) Amb. 556. *supra*, 457.
(*r*) Last page. (*s*) 2 P. Will. 78. 81.

death his real and personal assets were not sufficient for the payment of his debts; his widow, therefore, gave up the jewels and plate bequeathed to her, which were applied towards the debts; but in the decree obtained for the sale of the real estate, and for an account of the personal as well as real assets, the widow's claim of her jewels and plate was saved for her. In 1719, the testator's two sons died under age and without issue, whereby the estate tail of the settled lands expired, and the reversion in fee falling in, became liable by the will to the debts. The *Lord Chancellor* said, that in the present case, as there was an express bequest of the jewels to the widow, notwithstanding that, at the time of the death of the testator, there were not assets, either real or personal, yet since afterwards, though by a remote accident, assets had happened, there could be now no inconvenience to any creditor or others; and that this legacy should be paid, and the intention of the testator performed, and the rather, for that the real and personal assets were by the will made liable to the debts and legacies; especially as it was the constant rule, that a legatee, where the real estate was made liable to pay debts, on the creditors exhausting the personal assets, should stand in the place of the creditors, and be paid out of the land; and that this was stronger in the case of a specific legacy, the principal case, which was to be preferred in payment before a pecuniary legacy. His Lordship also decreed, that all the legatees were to be paid before the residuary legatee took any thing.

In the case of *Norman* v. *Morrell*,(*t*) *Sarah Long* devised her real estate, subject to an annuity, some legacies, and her debts and funeral expenses, and also subject to the debts of her late brother; and, by a subsequent codicil, gave a legacy to *Mary Norman*. The personal estate was exhausted in payment of mortgage and bond debts; *Mary Norman* filed a bill for her legacy, praying satisfaction thereof out of the testatrix's real estate, or at least to the extent of the personal estate exhausted in payment of such of her debts and legacies as should appear to have affected her real estates: and the Master of the Rolls decreed, that the assets should be marshalled.

SECT. II. The marshalling of assets in favour of legatees, where the real estate devised is not *charged by the will* with debts or legacies, but there is a specific *lien* on the real estate so devised;

And, first, we shall consider the cases where the *specific lien* is a mortgage.

In the case of *Lukins* v. *Leigh*,(*u*) *Benjamin Knight* having mortgaged his freehold lands for 2500*l.* began his will in these words: "As touching all my worldly estate, after payment of my debts and funeral charges, which I will to be first paid,(*x*) I give my freehold estate in *Kent* to my wife, for life, chargeable with an annuity of 30*l.* to *E. Knight* for life." And then, after his wife's death, he

(*t*) 4 Ves. 769. (*u*) Forrest. 53.

(*x*) As to the interpretation of this introductory clause constituting a charge upon the real estate, see Chap. 12. sect. 2. *supra*, p. 448.

gave his freehold estate, so charged, to the children of his three sisters, and directed the residue of his personal estate to be placed out at interest, his wife to have the interest for life, and, after her death, the principal to be divided among the children of his three sisters; and he gave his wife 1500*l.* with a proviso that the provisions in the will should be accepted by her in lieu of dower, and in satisfaction of her share in his personal estate. The question was, whether the personal estate should be applied in exoneration of the real, so as to defeat the general legatees, there not being sufficient to pay the 1500*l.* if the personal estate should be applied to exonerate the real? And Lord *Talbot*, C. decreed, "that the legatees must have the legacies out of the personal estate, in case the mortgagee kept to the real; and if he fell upon the personal, they had a right to stand in his room, for so much out of the real estate as he should take out of the personal, that being a proper fund for their payment."

In the case of *Forrester* v. *Leigh*,(*y*) *Charles Leigh* being seised of real and personal estate, and being indebted by mortgages contracted by himself, and in other mortgages contracted by the former owner on part of his real estate, from whom he purchased, and also in simple contract debts, after giving by his will several specific legacies to Lady *Barbara*, his wife, and several legacies to the plaintiff, he gave his real estate to his wife, for life, remainder to *Thomas* Lord *Leigh* for life, with divers remainders over. *Thomas* Lord *Leigh*, at his death, left the defendant Lord *Leigh*, his only son. The bill was brought by the plaintiffs, for their legacies; and if the personal estate should be exhausted in payment of debts by specialty, that the plaintiffs might stand in the place of the creditors, and be paid out of the real estate. Lord *Hardwicke*, C. observed, there were several questions; first, whether the plaintiffs were entitled to marshal the assets generally, and to stand in the place of the specialty creditors generally. First, he should consider the question as contended; (*i. e.*) to stand in the place of bond creditors, not accompanied with mortgages, where there was a devise of land. Secondly, he should consider it where there were mortgages. As to the first, no authorities went so far; they were otherwise; and as to the second question, respecting the mortgages, his Lordship said, "They are of two sorts, 1st, those which were contracted by the testator himself; 2d, those contracted by the former owner of the estates. The covenant for payment of those mortgages, entered into by the former owner, will not bind the personal estate of the testator. They were entered into *diverso intuitu*. The two purchasers did it to indemnify each other. The debt is apportioned on each part, and the testator covenants to pay his proportion, or to indemnify the purchaser of the other part of the estate. Where an estate descends subject to a mortgage, if no person will take an assignment of the mortgage, without the heir-at-law covenanting to pay, such covenant only subjects his personal estate collaterally. I am of opinion that the plaintiffs have a right to stand in the place of the mortgagees, to have satisfaction out of the real estate, for what they shall exhaust of the personal. A mere specialty debt is no lien upon

(*y*) Ambl. 171.

land in the hands of the obligor, his heir or devisee. A mortgage is a lien, and an estate in the land."(*z*).

The same rule holds *a fortiori* where the estate *descends* subject to a specific lien.

This has been long a settled rule of the Court of Chancery; we find it acted upon in an anonymous case, 32d Car. 2. (*a*) In the case alluded to, a father seized in fee, mortgaged the land, and gave a statute to the mortgagee to pay, &c. and by his will bequeathed 500*l.* to his daughter, and died; the mortgagee took so much of the personal estate in execution on the statute, that there were not sufficient assets left to pay the legacy. The question was, whether, as the heir had had the mortgage discharged out of the personal estate liable to the legacy, the daughter should have relief against the heir, for the amount of her legacy. And the Chancellor observed, "where the heir is indebted by mortgage made by his father, or by other means as heir to his ancestor, the personal estate in the hands of the executors shall be employed to pay that debt in ease of the heir: but if there be no assets to pay other creditors or legatees, the heir shall not turn his charge on the personal estate; in this case here was sufficient to pay the debt by mortgage and the legacy out of the personal estate, and when both can be satisfied, both shall be satisfied: and the contrivance to make the personal estate liable to the legacy towards the satisfaction of the mortgage looks like a fraud, and shall not prejudice the legatee, but she shall have recompense against or upon the mortgage, though originally not liable to her."

So also in the more recent case of *Lucy* v. *Gardiner*,(*b*) it may be collected that the estate *descended*, though that fact is not specified. In that case a bill was filed for a legacy of 1500*l.* given to the plaintiff *Sarah*, by the will of her father, who made the defendant, his son and heir, executor. The defendant insisted that there were not sufficient assets to pay the debts and legacies, and to show the deficiency, said, that the testator upon his marriage with his last wife, conveyed a freehold estate, and also a term for years in the *Sun* Tavern in *Holborn*, to trustees, to raise 1500*l.* for his wife, in full of any demand which she might otherwise have, and that he had sold the term for years, and thereby raised the 1500*l.* and paid the same to the wife, on which account the residue of the personal estate was not sufficient to pay the whole 1500*l.* legacy. But it was decreed, by Barons *Price*, *Page*, and *Gilbert*, that the executor should not apply the term to the payment of the widow's 1500*l.*: but that the same should go, in case of a deficiency of other personal assets, towards payment of debts and other legacies: and the 1500*l.* given to the widow (and then paid,) should remain a charge upon the freehold estate.

The preceding cases in this section illustrate also the following rule of the Court: "That although the natural fund for the payment of debts in the personal estate; and the heir or devisee of the real is in general entitled to have the personal estate applied in exoneration of incumbrances affecting the former; yet the Court of Chancery will not permit such arrangement to take place, when it would de-

(*z*) See also *Rider* v. *Wager*, 2 P. Will. 329. 335. *infra*, p. 630. *Aldrich* v. *Cooper*, 8 Ves. 397. (*a*) Chan. Cases, 2d part, 4. (*b*) Bunb. 137.

feat legatees of their legacies." The rule is further exemplified, in the case of a general legatee, by the case of *Rider* v. *Wager*,(*c*). In that case, *Admiral Littleton*, after making his will, by which he disposed of his real estate, and gave some general legacies, mortgaged the estate for 3000*l.*; and it was contended, that this debt should be paid out of the personal estate, prior to the specific, or at least before the general, legacies; and it was said to have been determined, that a mortgage should be paid out of the personal estate, in preference to the customary or orphanage part by the custom of *London;* which last was admitted by the Court, because the custom should not take place, till after payment of debts; and it was afterwards admitted by the counsel on both sides, that the land being made, by the testator himself, a fund for the payment of the mortgage money, should not be exonerated by the personal estate, so as to disappoint any of the debts or legacies, though it was entitled to such exoneration against an administrator or residuary legatee.

So also in *Oneal* v. *Mead*,(*d*) the rule is exemplified in favour of a specific legatee. In that case, one seised in fee of a real estate, which he mortgaged for 500*l.* and possessed of a leasehold, devised the former to his eldest son in fee, and gave the latter to his wife, and died, leaving debts which would exhaust all his personal estate, except the leaseholds given to his wife. Upon the question, whether the leaseholds devised to the wife should be liable to discharge the mortgage, the *Master of the Rolls* decreed, that, as the testator had charged his real estate with this mortgage, and, on the other hand, specifically bequeathed the leasehold to his wife, the heir should not disappoint the legacy by laying the mortgage debt upon it, as he might have done, had it not been specifically devised; and though the mortgaged premises were also specifically given to the heir, yet he to whom they were thus devised, must take them *cum onere* as probably they were intended. That, by such construction, each devise would take effect; *viz.* the leasehold estate would go to the devisee thereof, and the heir would enjoy the freehold, though subject to the burden, with which the testator in his lifetime had charged it. The *Master of the Rolls* also observed, that the resolution did not in the least interfere with *Clifton* v. *Burt*, because in the latter there was no mortgage.

The preceding cases are instances wherein the *specific lien* was a *mortgage;* and it appears clearly settled, that the assets may be so marshalled, as to let the legatees come upon the mortgaged estate devised or descended in the place of the mortgagee who has been satisfied out of the personal estate. We proceed, in the *next* place, to a question which has excited considerable discussion, namely, whether the assets will be marshalled in favour of legatees, where the *specific lien* on the real estate is that of a *vendor*, in respect of purchase money due to him by the testator, who was the purchaser; or in other words, whether the legatee of the purchaser has a right to come upon the real estate for the satisfaction of his legacy, to the amount for which the personal assets have been applied in payment of the purchase money, so due by the testator to the vendor.

(*c*) 2 P. Will. 329. 335. see also *Tipping* v. *Tipping*, 1 ib. 729. (*d*) 1 P. Will. 693.

The authorities are conflicting, and we shall first consider those which oppose the claim of the legatees.

Coppin v. *Coppin*,(*e*) determined, that the legatees could not stand in the place of the vendor, with respect to his equitable *lien*. In that case *Francis Coppin*, the younger brother of the defendant *John Coppin*, agreed with the defendant for the purchase of an estate in *Bucks* for 4000*l*. the purchase deeds were executed in the lifetime of *Francis*, but part of the purchase money only was paid. Afterwards *Francis* made his will, whereby, after giving several considerable legacies, he gave the residue of his land and goods to his brother *John Coppin*. The will was attested only by two witnesses. Afterwards *Francis* the purchaser died, leaving his brother *John* his heir at law and executor. The legatees filed their bill for their legacies. They alleged that the purchase deed was fraudulent, and according to one report(*f*) of the case, urged, that although the will could not charge the lands, yet that the vendor had an equitable *lien* thereon for the purchase money remaining unpaid: Lord *King* held, that the defendant *John Coppin* had a right to retain the residue of the purchase money out of the assets. It appears that the assets would be exhausted in discharge of the purchase money. The claim of the legatees to charge the real estate in the place of the equitable *lien* does not by the report appear to have been noticed by Lord *King*. The decree however virtually determined, that the legatees could not stand in the place of *John Coppin* the vendor, in respect of his equitable *lien*.

In the case of *Pollexfen* v. *Moore*,(*g*) *Thomas Moore* agreed to purchase of the plaintiff an estate for 1200*l*. but died before he had paid the whole of the purchase money. *T. Moore*, by his will, after giving 800*l*. to the defendant *Mary Moore* his sister, devised the purchased estate, and all his personal property to *J. Kemp*, and made him executor. *J. Kemp* committed a *devastavit* of the personal estate, and died, and the purchased estate descended upon *B. Kemp*, his son and heir. *J. Kemp* died intestate, and administration *de bonis non* of *T. Moore* was granted to *Mary Moore*. The plaintiff brought the bill against the representative of the real and personal estate of *T. Moore*, and *J. Kemp* for the remainder of the purchase money. Mrs. *Moore*, the sister and legatee of the testator, filed a cross bill, praying that if the remainder of the purchase money should be paid to the plaintiff *Pollexfen*, out of the personal estate of *T. Moore* and *J. Kemp*, she might stand in his place, and be considered as having a *lien* upon the purchased estate for her legacy. Lord *Hardwicke*, C. observed, "The vendor of his estate has a lien upon the estate he sold, for the remainder of the purchase money; for from the time of the agreement, *Moore* was a trustee as to the money for the vendor. But this equity will not extend to a third person, but is only confined to the vendor and vendee; and if the vendor should exhaust the personal assets of *Moore* and *J. Kemp*, the defendant will not be entitled to stand in his place, and to come upon the purchased estate in the possession of *J. Kemp's* heir. But then the heir of *Kemp* shall not avail himself of the injustice of his father, who has wasted the assets of *Moore*, which should have been

(*e*) 2 P. Will. 290. (*f*) Select Cas. ch. 28. (*g*) 3 Atk. 273.

applied in paying the defendant's legacy. Therefore, the estate which has descended from *J. Kemp*, the executor of *T. Moore*, upon *B. Kemp*, comes to him liable to the same equity as it would have been against the father, who has misapplied the personal estate; and, in order to relieve Mrs. *Moore*, I will direct *Pollexfen* to take his satisfaction upon the purchased estate, *because he has an equitable lien both upon the real and personal estate*, and will leave this last fund open, that Mrs. *Moore*, who can at most be considered as a simple contract creditor, may have a chance of being paid out of the personal assets." His Lordship decreed that the residue of the purchase money should, *in the first place*,(*h*) be paid out of the personal estate of *T. Moore*, but if it should be insufficient to pay such demand, and all *his other debts, legacies and funeral expenses*, or if the personal estate of *Moore* was not then sufficient, by reason that the assets of *Kemp* were not sufficient to answer such part thereof, as came to his hand, then such deficiency, so far as the personal estate of the said *T. Moore* should be applied in payment of the said purchase money, should be made good out of the purchased estate; and a competent part thereof was decreed to be sold accordingly.

In the preceding case, Lord *Hardwicke* expressed his opinion, that the equity did not extend to a third person; but he seems to have deviated from the rule in favour of a third person on the ground of fraud. Mr. *Sugden*, who discusses the point under consideration in his valuable treatise on the Law of Vendors and Purchasers, ingeniously suggests, that Lord *Hardwicke's* decision in *Pollexfen* v. *Moore*, was made on the ground that, as *Pollexfen* had not delivered the title deeds, but had by agreement kept them as a security for the purchase money, it must be considered as an equitable mortgage, and hence that the *dictum* and *determination* were not at variance; but Lord *Hardwicke* seems from the decision, as reported, to have proceeded exclusively on the ground of fraud in *J. Kemp*.

The authorities, in favour of the legatee's right to have the assets marshalled, remain to be considered.

The case of *Austen* v. *Halsey*,(*i*) bears upon the subject, though that case was decided upon the general construction of the will. In that case, *Robert Austen*, by his will, gave legacies to his daughters and others, and then devised and bequeathed his freehold, copyhold, leasehold, and other personal estates to trustees, absolutely, upon trust to convey and assign the same to his son *Henry Edward Austen* absolutely, when he attained twenty-one, or married before with consent; but in case he married before twenty-one without consent, the trustees were to settle the freehold and copyhold estates upon his son and his issue in strict settlement, with several remainders over; and also to assign the leasehold and other personal estates, and the savings and accumulations thereof, after payment *of debts and legacies*, to his daughters equally. By a codicil, dated 1st of November 1797, duly executed according to the statute, the testator stated that the trustees of a certain estate called *Titings*, had proposed to sell it to him, and in case of his death before the completion of the contract, he directed his trustees to complete the same,

(*h*) As corrected by Mr. Sugden from the Register's book, Vend. and Pur. 533. Ed. 1822.

(*i*) 6 Ves. 475.

and settle the estate to the uses in the will directed of his other estates; and he gave them a power to apply the personal estate to that purpose. On the 2d of November, the testator executed the contract for the purchase of the *Titing* estate for 7000*l.* exclusively of the timber which was to be taken at a valuation, and he died on the day following. The trustees completed the purchase out of the personal estate which was thereby exhausted. The daughters filed their bill against the brother and the trustees for their legacies; praying, among other things, that the purchase of the estate called *Titings* might be completed, the purchase money paid out of the testator's leasehold and personal estates specifically bequeathed, and not from the other personal estate, in order that the personal estate might be applied in payment of the legacies. Upon the first question, whether the bulk of the real estate was charged with the legacies? Lord *Eldon*, C. decided in the negative. And upon the second question, whether the purchased estate might by circuity be made answerable to the legacies? His Lordship said, "*Pollexfen* v. *Moore* is the only case cited; but, without that authority, I consider it clearly settled, that the vendor has a lien for the purchase money, while the estate is in the hands of the vendee: I except the case, where upon the contract, evidently that lien by implication was not intended to be reserved. That is, in equity, very like a charge, and the cases of marshalling seem to have gone this length, that where there is a charge upon an estate descended, a legatee shall stand in the place of the person having that charge, resorting to the personal estate; and I do not think a power to apply the personal estate, which is all that is given by this codicil, amounts to a command, leaving no discretion to the trustees. There is a difficulty here from the circumstance, that the estate purchased has not descended, but is devised; and there is a difference in marshalling as to that. In this instance it is devised to the heir with many remainders over. It may be found difficult for the legatees by means of this circuity to find a fund for payment."

In the case of *Trimmer* v. *Bayne*,(*k*) the question came before Sir *William Grant*, and called for a decision. In that case, a claim of *Alexander Bayne*, the heir at law of the testator, had been ascertained by the *Master's* report to amount to 3630*l.* and a fraction, in respect of specialty and simple contract debts, and the purchase money of real estates contracted for by the testator before his death, by writing not under seal, paid out of the money produced by sale of the testator's real estate. The deposit money only had been paid by the testator. The cause came on for further directions, and upon a petition by the heir, the principal question was upon his claim to be reimbursed his payments out of the real fund on account of the purchase money of the estates contracted for by the testator. The case of *Coppin* v. *Coppin* was not cited, but for the heir it was contended, that there was no decision against the *dictum* of Lord *Hardwicke* in *Pollexfen* v. *Moore*. The *Master of the Rolls* observed, in reference to that case, "this is a very obscure report, and it has perplexed me very much formerly; the decision is directly against the *dictum* of Lord *Hardwicke*. This cannot be distinguished from

(*k*) 9 Ves. 209.

the common case of marshalling; that a person having two funds shall not by his choice disappoint another having only one."

In the case of *Headley* v. *Readhead*,(*l*) the principle of marshalling seems to have been admitted in favour of the legatees, but (it is presumed from the expressions in the will, intimating in that case an intention on the part of the testator equally favourable to the devisees and legatees,) it was considered by the *Master of the Rolls* a case for rateable *contribution*. By the report of that case, the general effect only of the will is thus stated; "*William Readhead* by his will, reciting that he had contracted for the purchase of an estate, directed his executors to pay the purchase money for the same, and he devised the estate to his natural son, the defendant, and he also gave several legacies and annuities to the other defendants: the personal estate was deficient on account of certain *Scotch* leaseholds, not passing by the will, which, according to the *Scotch* law, was not for that purpose formally executed. The Master found the personal estate was about sufficient to pay either the purchase money due, *or* the legacies and annuities, but *not both*. The direction to the executors manifests a clear intention, in this case, that the devisee should take the devised estate, clear of the lien; and so far it seems a strong authority in favour of the legatees.

In the case of *Mackreth* v. *Symmons*,(*m*) the following observations of Lord *Eldon* occur: "I have some doubt upon another point; taking the vendor to have the *lien*, whether the Court will in the case of the death of the vendee marshal the assets, so as to throw the *lien* upon the purchased estate. It has often been said, and the case of *Coppin* v. *Coppin* stated as an authority, that the Court will not do that." The Lord Chancellor in his judgment takes no notice of that point. In that case the vendor happened to be the heir of the vendee; so that the estate was at home: and it was held, that, being also the executor, he was entitled to retain the purchase money out of the personal assets. That decision requires a good deal of consideration. If the estate had been in a third person, the general doctrine as to a person having two funds to resort to, might be thought to have an immediate application; and the express terms of the decree in *Pollexfen* v. *Moore*, might be found very inconsistent with it. In giving judgment upon a subsequent day, his *Lordship* discussed the cases on the doctrine of the vendor's *lien*, and observed, "the next case is *Coppin* v. *Coppin*, where the doctrine of *Pollexfen* v. *Moore*, as to marshalling, was, practically, though I doubt whether it ought to have been admitted;" and in alluding to Lord *Hardwicke's dictum*, that this equity would not extend to a third person, Lord *Eldon* continues, "If that is to be understood, that this equity would not extend to a third person, who had notice, that the money was not paid, Lord *Hardwicke's* subsequent decisions contradict that: if the meaning is that he would follow the case of *Coppin* v. *Coppin*, and that, if the vendor exhausted the personal assets, the legatee of the purchaser should not come upon the estate, there is great difficulty in applying the principle; as it would then be in the power of the vendor to administer the assets as he pleases; having a lien upon the real estate to exhaust the personal assets, and dis-

(*l*) Cooper, R. 50. (*m*) 15 Ves. 329.

appoint all the creditors; who, if he had resorted to his lien, would have been satisfied; and in that respect, with reference to the principle, the case is anomalous."

The cases seem now, however, to have clearly settled, that the vendor's *lien* will prevail, not only *against* the purchaser, but also against his heirs, and every person claiming through him, and even against a purchaser, for a valuable consideration, *with notice*. The only question, therefore, now is, not whether this *lien* extends to the purchaser, and those claiming through him, but admitting the general lien to that extent, whether the real and personal estate of the purchaser shall be so marshalled as to throw the *lien* on the real estate for the benefit of legatees of the purchaser: a question, it will be observed, between volunteers, all of whom derive their interests from the testator. It seems to be admitted, that assets would be so marshalled in favour of legatees, where the *lien* is an *equitable* mortgage, as well as where it is a *legal* mortgage; and there appears not to be any substantial difference between an equitable mortgage and the vendor's *equitable lien* for his purchase money unpaid, which is, by construction of equity, a charge upon the estate in the hands even of a purchaser, for a valuable consideration *with notice:* it would, therefore, seem to follow, that no substantial reason can be given against the marshalling of assets in this case. The only plausible objection against it was urged *arguendo* in the case of *Coppin* v. *Coppin*, and is forcibly stated by Mr. *Sugden*, in the discussion before alluded to, on the ground of the Statute of Frauds; but no practical inconvenience is likely to arise on this head. The authorities, therefore, may be considered, as having established the rule as to marshalling assets in favour of legatees, in the case of the vendor's *lien* in opposition to the case of *Coppin* v. *Coppin*, and the *dictum* of Lord *Hardwicke* in *Pollexfen* v. *Moore*. But, if the point is yet to be thought doubtful, at least the weight of authority is in favour of the rule, that the purchased estate, in respect of the vendor's *lien* for purchase money unpaid, shall be marshalled, so as to keep the heir or devisee to the estate; or, if they resort to the personalty for payment of the lien, the legatees may stand in their place, and resort to the purchased estate to the amount of the personal assets applied in discharge of the purchase money.

SECT. III. The marshalling of assets in favour of legatees, where the real estate is neither charged with debts nor legacies, nor subject to a specific lien, but there is *merely a general* lien on the real estate, which *descends* to the *heir*.

The next rule is, that assets are marshalled in favour of legatees, where the real estate is neither charged with debts nor legacies, nor subject to any *specific lien*, but there is a *general* lien and the estate *descends* to the heir. This rule was stated by Lord *Hardwicke*, in *Hanby* v. *Roberts*,(*n*) thus; if there be debts by specialty and legacies, and no *devise* of the real estate, but it *descends*, if the creditors exhaust the personal estate, the legatees may stand in their place, and come upon the real estate: This is against an *heir-at-law*. In the case of *Aldrich* v. *Cooper*,(*o*) Lord *Eldon* observes, "In the

(*n*) Amb. 127. (*o*) 8 Ves. 396.

cases of legatees, against assets *descended*, a legatee has not so strong a claim to this species of equity as a creditor; but the mere bounty of the testator enables the legatee to call for this species of marshalling; that, if those creditors, having a right to go to the real estate *descended*, will go to the personal estate, the choice of the creditors shall not determine, whether the legatees shall be paid or not."(*p*)

The rule was admitted in the case of *Scott* v. *Scott*.(*q*) There *Scott* devised to *Henry* his eldest and only son by a former wife, and to his heirs and assigns, all other his real estate not before devised; nevertheless, in case he should die without issue, not having attained twenty-one, then immediately after his death under age and without issue, unto the testator's son *William* and the heirs male of his body, with remainders over. The eldest son attained twenty-one. The specialty creditors, not having a lien on the estate, having exhausted the personal estate in satisfaction of their demands, the legatees contended to stand in their place, and come upon the real estate. The question was, whether the eldest son took by *devise* or *descent*; in the latter case, the legatees would be entitled, in the former not. And the Lord Keeper *Henley*, after having taken time to consider the point, gave his opinion, that the eldest son took by *devise*, as having under the will a different estate from that which would have descended to him; the one being pure and absolute, the other not.

Sect. IV. Exception, where the estate is devised.

But where the estate is neither charged with debts, nor legacies, nor subject to any *specific* lien, but there is only a *general* lien on the estate, and the estate does not *descend* to the heir, but is *devised* to a stranger, or to the heir taking as a devisee, the assets are *not* marshalled at least in favour of *general* legatees, so as to throw the general bond creditors upon the real estate. The reason is, that the will affords evidence of as strong an inclination on the part of the testator in favour of a specific devisee, as of a general legatee.

Thus, in the case of *Clifton* v. *Burt*,(*r*) *John Bignold* devised all his estate in *Morrow* and *Stoke*, to his son *John Bignold*, in tail, remainder to *Joseph Burt* in fee. He also devised his *copyhold* estates, which he *had* before surrendered to the use of his will, to his said son *J. Bignold*, in tail, remainder to the defendants *Joseph Burt*, *James Burt*, and *Elizabeth Horsnaile*, and their heirs, (subject to the annuity therein mentioned,) to the intent to sell the copyhold, and to apply the money to make good his debts and legacies, and he devised the residue to *Joseph Burt*, *James Burt*, and *Elizabeth Horsnaile*, equally. The testator further devised to the plaintiff, 500*l.* within three months after the death of the testator's son, if he died under age, and unmarried, in which case, he directed that all his personal estate, beyond what would pay his debts and funeral expenses, and the 500*l.* and the other legacies given by his will, should be equally divided among *Joseph Burt*, &c. and he appointed the plaintiff and two other persons executors. The son died under twenty-one; Lord *Harcourt* decreed, that the rents of the

(*p*) See also *Herne* v. *Meyrick*, 1 P. Will. 202.
(*q*) Amb. 383.
(*r*) 1 P. Will. 678.

real estate, together with the personalty, should be applied in payment of debts and legacies; but in case of deficiency, and if it appeared that any of the specialty creditors had been paid out of the personal estate, then the simple contract creditors and legatees were to stand in their place, and have satisfaction out of the real estate so far as the personal estate had been applied in payment of such debts, in equal proportion. Upon an appeal from this judgment, Lord Chancellor *Parker* reversed so much of the decree, as directed a sale of the *freehold* estate for the satisfaction of the legacy of 500*l.* and observed; First, that although equity will marshal assets in favour of a legatee, as well as of a simple contract creditor, yet every *devisee* of land is as a specific legatee, and should not be broken in upon, or made to contribute towards a *pecuniary* legacy. Secondly, that it was a rule, that if one give a specific legacy of a horse or diamond, and also a pecuniary legacy of 500*l.* to *B.* and there were not assets to pay both, still the specific legatee should be preferred, and have his whole legacy; for were the executor to make him contribute towards the pecuniary legacy, this would be, *pro tanto*, to make such specific legatee buy his legacy, against the manifest intention of the testator. Thirdly, that if a specific personal legatee should not contribute towards a pecuniary legacy, much less should a specific devisee of land. Fourthly, that if in the principal case the testator had devised the 500*l.* to *A.* and a term of five hundred years to *B.*, without leaving assets to pay the 500*l.* still the specific legatee of the lease ought to prevail, without contributing towards the pecuniary legacy, and if such pecuniary legatee should not break in upon a specific legatee of a term, *a fortiori*, he should not disappoint the will as to a devise in fee, which was to be favoured more than the devise of a term, in regard it was with more difficulty that a Court of Equity, in any case broke in upon, or charged, the real estate.

But there appears to be a distinction in the application of the preceding rule, as to marshalling in favour of *specific* legatees; for in that case it seems, that the real and personal assets *specifically* devised and bequeathed, will, upon failure of the general personal estate, be so far marshalled, (if indeed that term can in strictness be applicable,) that the specific devisee and legatee shall, each in proportion to the value of their respective gifts, *contribute* to the payment of the specialty debt. But with respect to a *simple contract* creditor, the exception is not admitted; for he must resort alone to the personal estate specifically bequeathed, as that is the only fund liable to his debt. This exception, in favour of the specific legatee seems more properly to fall under the doctrine of abatement, before discussed in Chap. V. sect. 2.(*s*)

The case of *Long* v. *Short*,(*t*) seems to establish the above exception. In that case, *David Long*, seised in fee of some lands, and possessed of a lease for years in other lands, and being indebted by specialty and simple contract, devised a rent-charge of 40*l.* a year, out of the lease for years to one grandson, the lease itself to another grandson, and *all* his land in fee to the plaintiff and his family in

(*s*) p. 253. (*t*) 1 P. Will. 403.

strict settlement. None of the devisees were the testator's heir, and the will was made since the statute for relief of creditors against fraudulent devises.(*u*) There being a deficiency of assets to pay debts, the question was, whether they should be charged on the freehold or the leasehold estate? And it was decreed by Lord *Cowper* C., *First*, That the devise of a rent-charge out of a term, was as much a specific devise, as if it had been of the term itself. *Secondly*, That the devise of a term for years was as much a specific devise as a devise of land in fee; wherefore each being equally specific devises, it would, in this case, be an equal disappointment of the testator's intention to defeat either, by subjecting it to the testator's debts. *Thirdly*, That since the statute of Fraudulent Devises, lands in fee were equally subject to debts by specialty in the hands of the devisee, as leases in the hands of the executor or legatee were to debts by simple contract at common law; so that, to prevent the disappointment of the testator's intention, the Court thought it reasonable, that the devisee of the fee simple estate, and the devisees of the lease and annuity, should respectively *contribute* to the debts by specialty, in proportion to the value of the premises; but that as to the debts by simple contract, if there should not be enough besides to pay them, they should fall upon the leasehold premises only. It was objected, that the fee simple lands ought to be more favoured than any of the personal estate and leases, for that the latter had always been decreed to go in aid of the former, and therefore, in this case, the leasehold estate ought to bear all the debts by specialty, as far as it would extend. But this objection was overruled by the *Lord Chancellor*, for that it might utterly disappoint the testator's intention in providing for his grandsons out of the lease; though his Lordship allowed, that if the devise had been to *B.* of all the *rest* of the testator's lands, it would have been a residuary, not a specific devise, and the devisee should not have come in till after the debts by specialty or otherwise had been paid out of his inheritance.

The fifth resolution in *Haslewood* v. *Pope*,(*x*) may probably at first sight be considered at variance with the case last cited. That resolution was in these words: "Where a man dies indebted by bond and leaves a personal estate, and devises lands to *J. S.* in fee, and gives specific legacies, and the creditor by bond comes on the personal estate to be paid his bond; the specific legatees shall not stand in the place of the bond creditor, to charge the land devised, because the devisee of the land is as much a specific devisee as the legatee of the specific legacy." It is presumed that Lord *Talbot*, in the expression "the specific legatees shall not stand in the place of the bond creditors to charge the land devised," must have intended, not that the devisee should not *contribute*, but that the specific legatee had no right to have the assets marshalled against the specific devisee, so as to throw the bond debt exclusively upon the real estate devised, to the exoneration of the personalty specifically bequeathed. In this qualified sense, the resolution in question and the case of *Long* v. *Short* probably may be reconciled, but the point cannot be considered free from doubt. The two authorities last

(*u*) 3 Will & Mary, ch. 14. (*x*) 3 P. Will. 322.

cited are clearly distinguishable from the case of *Clifton* v. *Burt*,(*y*) which decided that, in the absence of any charge of debts, or any specific lien upon the estate devised, specialty debts should not be thrown on the *devised* estate, in favour of a *general* legatee.

SECT. V. The extent to which equity will permit legatees to stand in the place of specialty creditors.

Having considered, in the preceding sections, in what cases equity will and will not marshal assets in favour of legatees, as between them and specialty creditors; we proceed to inquire, to what *extent* it will permit the legatees to stand in the place of specialty creditors, in those cases, where the assets are thus marshalled. The rule of the Court is, that legatees shall not be entitled to any greater privilege or advantage than the creditors themselves would be entitled to, from the amount or nature of their securities. The subject has been in a manner anticipated in the preceding sections, and sufficient cases have been adduced to show, that the legatees are entitled to resort to the real estate, only to the amount of the specialty debt or lien upon the real estate, in discharge of which the personal estate may have been previously applied. It remains further to remark, that if a creditor cannot, under his contract, affect the real assets in the hands of the heir or devisee, with the payment of his debt, a legatee who merely stands in his place, and upon the same terms, cannot be in a better situation. This is the case with all debts by simple contract, or by *specialty, where the heir is not expressly bound by the contract;* and, if so with them, legatees must be in the same predicament.

The case of *Lacam* v. *Mertins*(*z*) illustrates this rule with respect to a simple contract creditor, and may therefore be applied to the case of a legatee. In that case, Mrs. *Hay*, in the life of her husband, levied a fine of her estate, making it subject to a debt of 2000*l.* which had been contracted by her husband. After his death, she borrowed a further sum of 400*l.* and by an indorsement agreed, that the estate so pledged should stand charged with this 400*l.* and not be redeemed without payment of all these sums. The question was, how far simple contract creditors were entitled to come upon her real estate, in the place of specialty creditors. And by Lord *Hardwicke*, C., it was observed, "The rule of the Court, as to marshalling assets, and directing simple contract creditors to stand in the place of specialty creditors, *pro tanto*, to receive satisfaction, is a very just and beneficial rule, and ought to be adhered to; and the Court leans and endeavours to bring creditors within that rule, and extends it that all the creditors may receive satisfaction: yet it must be as between the real and personal assets of a person deceased; for the Court has no right to marshal the assets of a person alive; it not being subject to such a jurisdiction of equity till the death. Nor can the court extend this relief to creditors, further than the nature of the contract will support it; therefore it must be a specialty creditor of the person whose assets are in question, such as might have remedy against both the real and personal estate, or either, of the debtor deceased: it not being every specialty creditor,

(*y*) *Supra*, p. 636. (*z*) 1 Ves. sen. 312.

in whose place the simple contract creditors can come to affect the real assets; *viz.* where the specialty creditor himself cannot affect the assets, as where the heirs are not bound; and such it is here: heirs not being bound in the covenant. Now, to apply these general rules to the debts in question: for such debts, upon which there might be remedy against her in her life, or against her representative after her death, the simple contract creditors are entitled to receive satisfaction, *pro tanto;* and therefore, for the 400*l.* as being a specialty debt upon her own bond, after the husband's death, satisfied out of her personal assets; but not as to the 2000*l.*, which there is no ground to make her personal debt, or any debt of hers. It was originally her husband's, nor could she then make herself liable by contract. There is no covenant for her payment of the money, nor is there such a covenant, upon which any remedy could lie against her personal estate, unless she had been guilty of a breach; all the covenant being, that the estate should stand charged. This covenantee, therefore, could not have brought an action, or other remedy, against her or her representative, because no breach. Then there is nobody, in whose place to come *pro tanto;* and this is a case for which the Court never would strain, however liberal they are in such cases, in the construction for creditors; for it is material in this case, that it is the husband's debt, and the intent was, not to change the nature of it, and to make it her debt, for it is only recited in the deed, and the recital of a debt under hand and seal has been held to be no specialty debt, for it must stand upon its own force; and so I have known it determined by Sir *Joseph Jekyll.*"

It may be properly noticed in this place, that, in instances where there is not any deficiency of assets, if a creditor apply the subject of a specific bequest in satisfaction of his debt, the executor or residuary legatee will be obliged to make the specific legatee a recompense out of the general assets, as they can retain nothing to their own use, but the residue, after debts and legacies paid.

Thus, in the case of *Bowaman* v. *Reeve*,(*a*) the testator being seised and possessed of a considerable estate in *Holland*, consisting of houses, goods, merchandises, jewels, and other effects, and being a native of that country and residing there, sent for a notary public to make his will, and, according to the custom of the country, an instrument was drawn up in the nature of a will, and executed, whereby the testator gave some of the houses to the minister of the Presbyterian meeting there, and others to the minister of the Reformed Church there; and then gave all the residue of his goods, chattels, plate, jewels, and other effects, (which were very particularly enumerated,) to the defendant, whom he made universal heir and executor, and died possessed of a very considerable personal estate in *England*, besides what he had in *Holland*. By the laws of *Holland*, there is no distinction between real and personal estate, but both are equally liable to the satisfaction of creditors; and therefore, after the testator's death, his creditors in *Holland* took possession of the houses specifically devised, in satisfaction of their debts; and though there were other considerable effects in *Holland*, yet the residing devisee and executor would not intermeddle therewith; be-

(*a*) Pre. Ch. 577.

cause, if he did so, by the law of that country he must take upon him the payment of all the testator's debts, notwithstanding a deficiency of assets; but he proved the will in *England*, and possessed all the testator's estate and effects here, upon which the plaintiffs, who were devisees of the houses in *Holland*, brought the bill against the executor, and residuary legatee, to have a recompense in proportion to the value of the houses. And the *Chancellor* decreed an account and satisfaction accordingly; although it was urged, that those houses, by the law of this country, were liable to the payment of debts, and therefore, the specific devisees ought to take them liable thereto, and that the testator never intended to give them otherwise, or to give them any other part of his estate. And his Lordship also said, that there was no difference between a devise of these houses, and a devise of a house or a term for years, and that in those cases, if the creditors brought an action, or sued out execution upon a judgment against the executors, and took the house or term for years, in execution, which they might do, notwithstanding the specific devise thereof, yet, most certainly, the executor or residuary legatee, should be obliged in equity to make them a recompense; for they were to have nothing to their own use but the residue, after the debts and legacies paid, and the *residuum* was chargeable with the debts; though, as to the creditors, they might take what they thought fit in satisfaction of their debts, and the enumerating of particulars in this devise of the *residuum*, made it no more a specific devise, than if he had only said in general, all the rest of his goods and chattels, or such like words; and therefore this *residuum* was liable to the payment of debts, although the creditors thought fit to fix on other parts of his estate, and thereby deprived the specific legatee of what was intended him.

SECT. VI. The consideration of those legatees for whom a Court of Equity *will not* marshal assets.

We proceed to inquire what legatees they are for whom equity will *not* marshal assets.

1st. It appears to be now settled, that equity will *not* marshal the assets, in instances, where the legatees, at the time of the legacies becoming due, have *not* an established claim distinctly and solely upon the personal estate. If, therefore, a legatee have a claim, at the testator's death, upon both the real and personal assets for the payment of his legacy, but by some subsequent event, as the death of the legatee before the time of payment, the remedy upon the real estate is defeated; the Court will not marshal the assets in favour of the legatee's representative, so as to preserve a personal fund for payment of the legacy. This Lord *Hardwicke* expressed as his opinion in the case of *Prowse* v. *Abingdon*.(*b*) the facts of which are before stated. The executors were not before the Court, and no decree respecting the marshalling of assets, so that the legatee might be satisfied out of the personal estate, could be made; but his Lordship clearly expressed his opinion, that it could not be done: "For that the rule of marshalling assets in manner before mentioned, would hold, only where it was proper to be done at the time the le-

(*b*) 1 Atk. 482. *supra*, p. 435. *Ord* v. *Ord*, 2 Dick. R. 439. *S. P.*

gacy first took place, and not where it was owing to a fact, which happened subsequent to the death of the testator, and to a mere accident, the death of the legatee before twenty-one." Lord *Hardwicke*, however, seems to have altered his opinion in the subsequent case of *Reynish* v. *Martin*;(c) but the rule as above stated has been revived by Lord *Loughborough's* decision in the case of *Pearce* v *Loman*.(d) In that case, *Joseph Palmer* devised all his real estate in the parish of *Brodwinson*, in the county of *Dorset*, to *Robert Pearce* and *Robert Taylor*, upon trust, to permit his mother to receive the rents and profits for her life, and, after her decease, to apply the same for the maintenance and education of *Thomas Pearce*, son of *Robert*, until he should attain twenty-one, and when he should attain twenty-one, in trust for him in fee; and if he died under twenty-one, upon other trusts. The testator gave to *Thomas Pearce*, and *Robert*, another son of *Robert Pearce* the elder, 1000*l*., to be paid at twenty-one, with interest at three *per cent*. in the mean time from his (the testator's) death, to be applied for the support and education of *Thomas Pearce* and *Robert Pearce* the younger. After several other legacies, the testator gave other real estate in the parish of *Crewkerne*, in the county of *Somerset*, and all the residue of his personal estate, subject and charged with the payment of his debts, legacies, and funeral expenses, to his two trustees, in trust, to see his debts, legacies, and funeral expenses paid, and, after payment thereof, in trust for his cousin *John Perkins* absolutely, upon condition he should discharge the testator's debts, legacies, &c. and the testator appointed his said trustees executors. *Robert Pearce* the younger died under twenty-one, intestate and unmarried, whose father as administrator claimed the legacy. The question was, whether, as the legacy was a charge upon the real as well as the personal estate, the Court would so marshal the assets, as to direct payment of the legacy out of the personal estate, although it failed as a charge upon the lands by the death of the legatee before the time of payment. Lord *Loughborough*, C. after noticing Lord *Hardwicke's* observations before stated in *Prowse* v. *Abingdon*, expressed himself thus; "If marshalling could be carried to the extent of *Reynish* v. *Martin*, it might have been pursued in all the cases, that have been decided. There is a singularity in the doctrine, as it now stands: that, as far as it affects one fund, it is good; as far as it affects the other, bad: but it would be still more singular, if it shall sink in one case, and not in the other, but the land making good the personal estate shall be charged. The point was of very little moment in *Reynish* v. *Martin*; for in Mr. *Forrester's* note, the gross amount of the personal estate is stated to be 100*l*. and Mr. *Wilbraham*, in Lord *Hardwicke's* note, says, it is 100*l*. odd shillings and pence, therefore he speaks accurately from an account of it. The legacy was 800*l*. Therefore, I would not follow that case to introduce a new point with regard to marshalling assets against established rules. The assets cannot be marshalled. It would be directly against *Prowse* v. *Abingdon*: the contingency is the same, and I cannot charge the real estate indirectly. I have found, in Lord *Hardwicke's* note book,

(c) 3 Atk. 330.
(d) 3 Ves. 135. see also Duke of *Chandos* v. *Talbot*, 2 P. Will. 612.

the case of *Lowe* v. *Mosely* referred to in the argument. There is very little of it, but exactly what he states. The note is this: "*Lowe* v. *Mosely*, upon the will of *Mills;* 300*l.* given to his daughter: 150*l.* at the age of twenty-four; 150*l.* at twenty-six. He devises his real estate to his son *James*, he paying debts and legacies. Several questions upon acts the son had done. He had mortgaged: questioned, whether the charge remained against the mortgagee. She died between twenty-four and twenty-six. I was of opinion, that 150*l.* was due; but that the other 150*l.* sunk into the real estate, she dying under twenty-six." Not a word said about marshalling: it was a mixed fund, and a mortgage, I think, was one of the charges that affected the personal estate."

2. Equity has also refused to marshal(*e*) the assets, in favour of *legacies given to charitable uses;* as that would be considered a mean to evade the Statute of Mortmain,(*f*) and to affect, in substance, a charge upon the land, within the spirit of that act.

In *Mogg* v. *Hodges*,(*g*) *Jane Churchill* devised her real estate to trustees, to be sold, the profits to be applied to the uses of the will. She directed that her debts and legacies should be paid out of the personal estate, made the trustees executors, and left them all the residue of her personal estate, and of the money to arise by sale of the real, to be given in what charities they should think proper, recommending particularly to them the hospital at *Bath*. The question was, whether the assets should be so marshalled, that all the other legacies should be paid out of the real estate, so as to leave the personal to go to the charity? And Lord *Hardwicke* said, he thought himself not warranted to set up a rule of equity, contrary to the common rules of the Court, merely to support a bequest which was contrary to law.

In the case of *Attorney General* v. *Tyndall*,(*h*) *Mary Packer* devised all her freehold and leasehold estates, to trustees to sell, and out of the money to buy ground for an almshouse in the parish of *St. James's*, in the city of *Bristol;* and likewise to erect an almshouse, and to lay out the residue of the money in land; and out of the rents and profits to pay certain stipends to twenty poor people, whom she had before appointed to be in the almshouses; and until such purchases could be made, she directed the money to be laid out on real or Government securities. And in case the charity could not by law take place according to her directions, then she ordered her trustees to lay out the money in such charitable uses, intents, and purposes, as near to her intention as could be, and the laws would permit. She then gave the residue of her estate to such uses, intents, and purposes, as aforesaid. By a decree in 1759, it was declared that the devise of freehold and leasehold estates to the charity was void; and an account was directed to be taken of the personal estate. On further directions, the *Master of the Rolls* declared, that if the trustees could obtain the gift of a piece of ground in *St. James's* parish, *Bristol*, they might erect an almshouse upon it, and declared, that the trustees were entitled to have the assets marshal-

(*e*) For instances of apportionment, *vide infra.* (*f*) 9 Geo. 2. c. 36.
(*g*) 2 Ves. sen. 52. (*h*) Amb. 614.

led, by applying the leasehold in the first place in payment of debts, legacies, funeral expenses and costs, in order to leave more of the personal free and clear for the purposes of the charity. The defendants having appealed from this decree, Lord *Henley*, Chancellor, after argument at bar, and time for consideration, thus delivered his opinion: "As to the freehold, there is no doubt that must go to the heir at law. The question respects only the leasehold, which, by reason of the devise being void, falls into the *residuum*. And on this, whether the Court shall marshal the assets, and by applying the leasehold in the first place to payment of debts, leave the other assets to be applied to the charity, and by that mean do *per obliquum*, what could not be done *per directum*. This would be a method to elude the statute, which I will not do. The second question respects the building an almshouse, if the trustees can get the ground given them. The decree in this part is founded upon the precedent of the *Attorney General* v. *Bowles*, which is an authority for the *Master of the Rolls*. But I feel only one authority, that of the House of Lords, which is a superior court; no other authority has any influence on my judgment. The precedent has no influence upon me; it is contrary to the spirit of the statute. In common sense, it is laying out money in land: it improves the scite, is demandable in a *præcipe*, and is a purchase of so much realty; such a determination is opening a door to avoid the statute." And his Lordship held the devise of the residue to be void, as being given to be laid out in lands and tenements. And the decree was reversed.

Again in *Foster* v. *Blagden*,(*i*) *Sarah Knapp* devised her real and personal estate, after payment of her debts, funeral expenses, and charges of proving her will, to the plaintiffs, in trust, to dispose thereof, and directed the trust money to be paid to certain charitable uses. The question was, whether the Court would marshal the assets, and order the debts to be paid out of the real estate, in order that the personal might be left clear, so that the devise to the charity might take effect. *Smith*, Baron, who sat for the *Lord Chancellor*, declared his opinion, that the debts could not be thrown upon the real estate; and that the cases of *Mogg* v. *Bath Hospital*, and the *Attorney General* v. *Tyndall*, were in point.

Again, in *Hillyard* v. *Taylor*,(*k*) *William Brown*, after devising an estate to the plaintiff and his family, and several legacies, bequeathed all his personal estate, together with his estate at *Foxfield*, held by lease of the Bishop of *Winchester*, descendible to his right heirs, in trust, to sell the said estate, and out of the money to pay his just debts, funeral expenses, and several legacies; and the Warden and Fellows of *Winchester* College 100*l*., to be disposed of as they should think fit, for the use of superannuates, not succeeding to *New College*: to the county hospital at *Winchester*, 50*l*.; to the Governors of the charity for relief of poor widows and children of clergymen, 600*l*. And after reciting, that it was uncertain what his effects might amount to, he gave whatever remained, after payment of debts, legacies, and other charges, to his executors, to be disposed of to such charitable uses as they should think fit, and appointed

(*i*) Amb. 704. (*k*) Amb. 713.

Taylor and *Knapp* executors. In 1761, the *Master of the Rolls* decreed, that if the personal estate should be wholly or in part exhausted, in satisfying the debts and funeral expenses, and such of the legacies as were not given to charity, then the legatees of the charitable bequests should stand in the place of specialty creditors, and receive a satisfaction *pro tanto*, out of the real estate: but without prejudice to the question, whether the legacy of 100*l.* given to the Warden and Fellows of *New College*, was within the saving clause of the Statute of Mortmain, which might arise, in case the before mentioned marshalling of assets should not be sufficient to furnish the whole of the legacies given to charities; and he directed an account of the rents and profits of the *Hampshire* estate, and the balance to be applied to make good the deficiency of the personal estate; and if those funds should prove deficient, the real estate in *Hampshire* to be sold, and applied to make good the deficiency. The personal estate, and the rents and profits of the *Hampshire* estate, proving deficient, that estate was sold, and the purchase money paid into the Bank, and laid out in 4295*l.* 15*s.* 8*d.* three *per cent.* annuities. After twelve years, there was an appeal from the above decree, occasioned by the determination of *Foster* v. *Blagden.*(*l*) And the *Lord Chancellor*, without hearing the reply, reversed the decree, so far as related to the charitable legacies to *Winchester* Hospital, and for the relief of widows and children of clergymen, on the authority of *Foster* v. *Blagden*, and directed an inquiry, what fund was established at *Winchester* College, to defray the expense of superannuates at either of the Universities; and, after ordering the costs, declared that the residue of the three *per cents.* belonged to the heir-at-law.

In *Makeham* v. *Hooper*,(*m*) *Joseph Lloyd*, being seised of freehold and copyhold estates, and possessed of leasehold and other personal property, devised to trustees all his freehold, leasehold, copyhold, and personal estates to sell, and out of the money to pay, among other legacies, 200*l.* to the *Bath* Infirmary, and other charitable legacies to the amount of 1200*l.*; also 200*l.* to erect a monument to the memory of *J. Curle;* and after payment of several general legacies, to pay the surplus of the money arising from the real and personal estates, unto the plaintiff, and *D. Evans*, and appointed them executors. *Evans* died in the life of the testator. By codicil, among other legacies, the testator gave to two of the defendants 100*l.* in trust for another charity, (but without naming any fund out of which it was to be paid), and ordered a monument to be erected to himself. He afterwards made a second codicil, by which he gave some legacies, and died in *November* 1781, leaving the plaintiff his surviving executor and residuary legatee, and two others of the defendants his heirs at law, and next of kin, who had assigned their claims to the plaintiff. The bill, after the usual prayer in regard to the will and codicils, and the general personal estate, prayed that the charitable legacies might be declared void, and to fall into the residue; and that the real estate might be sold, and the clear residue of the money, as also the testator's personal estate might be

(*l*) *Supra*, preceding page. (*m*) 4 Bro. C. C. 153.

declared to belong, and be paid to the plaintiff as residuary legatee. The cause was heard before Lord *Thurlow*, C. in February 1784; and by the decree, the will and codicils were declared well proved, and ought to be established and the trusts performed; and it was referred to the Master to take the proper accounts, and to distinguish what arose from chattels personal, and chattels real; and he reserved the consideration, whether the charity legacies were to be paid, and in what manner, and all further directions till after the Master's report: from which report, it appeared, that the money received by the plaintiff and the trustees, amounted to 1988*l.* 7*s.* 7½*d.*, and that they had paid 1037*l.* 15*s.* 5*d.*: so that there remained a balance of 950*l.* 12*s.* 2½*d.* That the legacies, besides the charitable ones, amounted to 4490*l.* So that the personal estate fell short of paying the same in 3539*l.* 7*s.* 9½*d.*; and that the real and leasehold estates sold for above 6000*l.* The question was, whether the assets should be marshalled? And it was decreed in the negative; *Ashurst*, Lord Comm. observing, that "he thought they were bound by the recent cases with respect to the question of marshalling: that it did not appear what was the reason of the turn in the cases, but as the decisions had taken that course, they would not alter them." But the legacy to the *Bath* Infirmary, was ordered to be paid, in consequence of the Act of the 19th Geo. 3. c. 23. permitting that charity to take in mortmain.

The preceding authorities clearly settle the rule, that the Court of Chancery will not marshal the assets, so as to throw the debts upon the real estate and leave the personal a clear fund for the charity; but it will be proper in this place to notice a rule of the Court in the administration of the general residue bequeathed to a charity, and consisting partly of mortgage securities and leaseholds which savour of the realty, and partly of assets purely personal. In such case, the bequest of the residue, so far as regards the mortgage securities and leaseholds, fails, as being within the Statute of *Mortmain*, and lapses for the benefit of the next of kin. As between such next of kin, who are considered in the light of legatees of the mortgage securities and leaseholds, and the charities which have an indisputable right, as legatees of the other personalty not partaking of the nature of real estate, the Court will not allow a creditor or general legatee to resort exclusively to the assets purely personal, to the disappointment of the charity, but will direct a rateable contribution by the charities and next of kin, in proportion to their respective interests, for the satisfaction of the debts and legacies. In the exercise of this branch of equitable jurisdiction, the Court adopts a rule well established by the case on marshalling, namely, that a person, having two funds to resort to for the satisfaction of his demand, shall not, by his option of resorting to either of those funds, determine whether one of two parties, whose equities are equal, shall be paid or not.

The above rule respecting contribution does not appear so distinctly stated, that it was acted upon in the case of *Attorney General* v. *Winchelsea*.(*n*) Nor indeed has the Editor discovered an earlier case, wherein it is explicitly laid down. In the case just men-

(*n*) 3 Bro. C. C. 373.

tioned, and which will be more fully stated in a subsequent part(*o*) of this work for another point, the Rev. *Robert Chapman* bequeathed the residue of his personal estate to trustees, upon trust to invest it in the funds, and apply the annual produce for the support of certain charities.

A considerable part of this residue consisted of money secured on mortgage. One of the questions in the cause was, whether the bequest of the residue, so far as it related to the real securities, was not void, as being within the Statute of *Mortmain*, and it was insisted for the next of kin, that they were entitled to these mortgage securities. The *Master of the Rolls*, as appears from a note of part of his judgment given in *Belt's* edition, page 380, first considered the cases as proving that the assets could not be marshalled; and then said that he conceived this case to stand upon the same ground, as if the testator had specifically bequeathed his mortgages to one person, and the other part of his personal estate to another. In such a case, they should contribute to the payment of the debts and legacies *rateably*, according to the amount of what they each took. The next of kin, in that case, he considered, as if he had been a legatee of the mortgages, and therefore decreed that the payment of the debts and legacies should be made out of the mortgages, and out of the rest of the personal estate rateably according to the amount of each of them respectively.

The rule was stated in *Howse* v. *Chapman*,(*p*) *arguendo*, by the counsel for the next of kin, and acted upon by the Court. In that case, *Leonard Coward*, after enumerating several specific parts of his residuary personal estate, gave the same, after payment of debts, legacies, funeral, and testamentary expenses, to be appropriated to the improvement of the city of *Bath*. There were parts of the personal estate not enumerated, and undisposed of. After the testators death the bill was filed by the executors to establish the will, and ascertain the rights of the parties; the heir at law and next of kin contending, that the bequest of the residue was void for uncertainty of its object, or, if not void on that ground, it was void under the statute 9 *Geo.* 2. c. 36. as to such parts as were of the nature or consisted of real property. By the decree the will was established, and the trusts directed to be carried into execution, except as to the money secured on real estate; and an account of the personal estate was directed. From the *Master's* report, it appeared that part of the personal estate, which was held to pass by the bequest for the improvement of the city of *Bath*, consisted of mortgages to the amount of 4950*l.*, certain bonds of the commissioners for the improvement of the city of *Bath*, *Bath* corporation and turnpike bonds. The cause coming on for further directions, a point was made on behalf of the next of kin, that the debts, legacies, and funeral expenses, and the costs of all parties were to be paid in equal shares, out of the personalty bequeathed for the improvement of the city of *Bath* and the personal estate undisposed of. On behalf of the next of kin, *Attorney General* v. *Winchelsea* was cited, and it was urged, that "where a residue is left for charitable purposes including mortgages and other interests that cannot go to the charity, the debts and

(*o*) Vol. 2. chap. 19. sect. 7.

(*p*) 4 Ves. 542.

legacies shall be paid out of the two parts of the estate *pro rata*:" and the Lord Chancellor said, the bequest of the city of *Bath* of particulars enumerated was specific, that the articles not enumerated went to the next of kin, and that the general residue was to be applied, in the first place, in payment of debts and other charges. And he further observed, that the case was directly within *Attorney General* v. *Winchelsea*, with regard to the mortgages and other things that were taken out of the bequest; because the law takes them out of it. The decree declared, that the bequest for the improvement of the city of *Bath* was a charitable bequest, and that the mortgages and bonds of the commissioners for the improvement of the city of *Bath* and the turnpike bonds did not pass, but were undisposed of by the will, and belonged to the next of kin; and it was directed that the *Master* should distinguish such of the particulars of the personal estate specifically bequeathed for the improvement of the city of *Bath*, as *were* well given, from such particulars as did *not* pass thereby, but belonged to the next of kin; and it was further ordered, that the same be applied *pro rata* for the payment of so much of the testator's debts, legacies, and funeral expenses, and of so much of the costs as the general residue of the testator's personal estate undisposed of by his will would not extend to pay, and that such particulars of the personalty, specifically bequeathed for the improvement of the city of *Bath*, as did not pass, be divided, after payments before directed, among the testator's next of kin, according to the Statute of Distribution; and that such particulars, specifically bequeathed for the improvement of the city of *Bath*, as were well given, after the payments thereout directed, be paid to the defendant the clerk to the commissioners for the improvement of the city of *Bath*.

Again, in *Paice* v. The Archbishop of *Canterbury*,(*q*) *Mary Wilks* gave the remainder of her different bequests to the Archbishops of *Canterbury* and *York* for the time being, in trust for charitable purposes, and bequeathed her house in *Grosvenor Square*, and all her property in *London*, to be sold; and after payment of a mortgage, the monies arising from the sale to be applied to the general purposes of her will. The *first* question was, if the general residue passed to the Archbishops of *Canterbury* and *York* for charitable purposes; and *secondly*, if so, whether the money produced by the sale of the testatrix's leasehold house in *Grosvenor Square*, and freehold estate in *London*, were liable to any part of the debts, legacies, and costs. The Lord *Chancellor* decided, that as to the real estate devised to the charity and personal estate connected with land, as leaseholds and mortgages, the disposition was void under the statute;(*r*) and, at the conclusion of his judgment, observed, the same arrangement must take place by apportionment of the charges between the funds, as in the case of *Attorney General* v. *Winchelsea*.

Lastly, in the case of *Curtis* v. *Hutton*,(*s*) the above rule received a further confirmation. In that case, *George Hutton* directed his real estates to be sold, and declared that the produce of such sale, and the rents in the mean time, should constitute part of his per-

(*q*) 14 Ves. 372. (*r*) 9 Geo. 2. c. 36. (*s*) 14 Ves. 537.

sonal estate, and be subject to the trusts thereof: and he bequeathed his personal estate, and the monies to be produced from his real estate, to trustees, to pay debts and legacies. He then bequeathed 200*l.* to the trustees of a charity school in *Butt Lane, Deptford*, for the purpose of purchasing lands contiguous: and he declared the trusts of the residue of his personal estate to be for such purposes as he should by deed or codicil appoint. By codicil, the testator directed the trustees to lay out the trust monies in the purchase of freehold estate in *Great Britain, or* in the public funds, or in other proper security, the income of the trust fund to be applied in an establishment for students in the *King's College* of *Old Aberdeen.* The bill was filed by the trustees against the widow and only daughter of the testator, to have the will established, and trusts carried into execution. The answer insisted that the bequests of the residue to the college at *Old Aberdeen* of the 200*l.* to the charity were void, and submitted, whether, if the former were good as to the personal estate, it ought not to be postponed until after payment of debts and legacies. It was contended on their behalf, that, supposing the disposition void, the debts, legacies, and annuities must be thrown upon the fund which was effectually given to the charity; and also upon that fund, the disposition of which failed, in the proportion the respective funds bore to each other, according to the rule established in the *Attorney General* v. *Winchelsea.* The *Master of the Rolls* said, the rule, as contended for, was settled by many cases: And he determined also, that nothing which was the produce of the testator's real estate passed under the dispositions to the charities.

The reader will observe the distinction between the rule of *contribution* established by the class of cases just discussed; and the case of *marshalling.* By marshalling, the Court would indirectly allow the charge upon the real estate for the benefit of a charity, contrary to the Statute of *Mortmain;* and the practical result would, in most cases, be that of excluding the next of kin, wholly, or in part, from that portion of the residue which fails by the statute, and to which by law they have an equal right with legatees, to whom legacies are effectually given. On the other hand, the Court, in adopting the rule of *contribution* before stated, considers the equities of the next of kin and the charities equal, and therefore directs a rateable contribution from each toward the payment of debts and legacies.

SECT. VII. The mode in which *equitable* assets are distributed among legatees.

When assets are marshalled in favour of a legatee, the personalty having been wholly or in part applied in payment of a specialty debt, we have seen that the legatee may resort to the real estate to the amount of the personalty applied in satisfaction of the specialty debt; and in such case, if there are several legatees, they will be paid *pari passu;* and if the fund be insufficient to satisfy the whole of their respective legacies, each legatee must abate in proportion to the amount of his legacy. But suppose the case is not one of marshalling, there being but one fund for the payment of all claim-

ants; as, for example, where there are not any personal assets, and the real estate is either devised upon trust to pay, or only charged with the payment of debts and legacies; in such case the assets are *equitable*, and it remains to consider in the present section, the mode in which such *equitable* assets are distributed among creditors and legatees.

It may be proper in this place, while mentioning equitable assets, to premise, that before the statute of 3. *Will & Mary*, c. 14. a *specialty* creditor had not at Common law any remedy for the recovery of his debt against a *devise* of the real estate for the payment of debts,(*t*) but he was obliged to resort to the assistance of a court of equity. The estate, therefore, thus devised was considered *equitable* assets. By the statute above mentioned, devises of real estate were made void against specialty creditors, their real and personal representatives; in favour of whom remedies were given by the statute against the heir and devisee, without the aid of a court of equity. In this act, however, there is a proviso excepting out of its operation devises of the real estate for *the payment of debts*, or *portions* for children under articles or settlement *before* marriage; so that such devises for payment of debts and portions, continue now, as they were before the statute, subject to equitable jurisdiction; and consequently real estates thus devised are assets distributable upon the principle of the Court, that equality is equity. It is now clearly settled, that real estate devised upon trust to pay, or merely charged(*u*) with the payment of debts, and although descending(*x*) upon the heir thus charged, are equitable assets, and distributable, *pari passu*, among creditors, whether by specialty or simple contract.

Thus in the case of *Plunket* v. *Penson*,(*y*) *Penson* the testator, who was *cestui que trust* of a real estate, mortgaged it in fee, and being entitled to the equity of redemption, devised the estate to his son and his heirs, subject to the payment of debts, annuities, and legacies, and died indebted by bond and simple contract. The questions were, whether the assets of the testator were legal or equitable? and whether the simple contract creditors were to come in *pari passu* with the plaintiff, the bond creditor, or whether the bond creditor should be paid in course of administration. It was insisted for the simple contract creditors, that the devise to an heir of an estate charged with debts was the same thing as devising it in trust to him for the payment of debts; that they were equitable assets, and all creditors entitled to come in *pari passu:* that the bond creditor could not recover at law, because the testator, who was obligor, had not the legal estate, and the estate was in mortgage, so that he was obliged to come into a court of equity for a satisfaction. Lord *Hardwicke* decided, that the assets were *equitable*, and distributable among the creditors, without any distinction as to priority; and he directed an account of the testator's personal estate to be applied in payment of his debts, in a course of administration; and if that should not be sufficient, then an account of the rents and profits of his real estate to be applied in payment of the debts not satisfied by the personal estate, *pari passu*. And if the

(*t*) *Plunket* v. *Penson*, 2 Atk. 291. (*u*) *Bailey* v. *Ekins*, 7 Ves. 319.
(*x*) *Hargrave* v. *Tindal*, 1 Bro. C. C. 136. note. (*y*) 2 Atk. 290.

personal estate, and the rents and profits of the real should not be sufficient to pay the debts, it was ordered, with the consent of the mortgages, that the real estate should be sold, and the money, after payment of the mortgages, applied in discharge of what should be remaining due to the other creditors of the testator *pari passu*. And that if any of the creditors by specialty should have exhausted any part of the personal estate in satisfaction of their debts, they were not to receive any further satisfaction out of the real estate, until the other creditors should be made up thereout equal to them.(*z*)

But this equality of distribution is confined to those only, whose equities are equal, as to creditors among themselves; and is not extended to *legatees* jointly with creditors; for the latter will be preferred to the former; and this, although *the trust* be for the payment of debts *and* legacies, or although the real estate be *charged* with the payment of both. There is, indeed, an *anonymous* case in *Vernon*,(*a*) the decision in which directed that the debts and legacies should be paid in proportion; as the assets were equitable; there are also *dicta* in other cases(*b*) corresponding with that direction. There are two cases, however, determined in favour of the priority of creditors, *viz.* Sir *John Bowle's* case,(*c*) determined upon a rehearing by Lord *Nottingham*, in which he reversed the decree of Lord Keeper *Bridgman* in favour of an indiscriminate distribution among the creditors and legatees; and declared his opinion, "that in the case of trust for the payment of debts and legacies, the debts ought to be preferred and satisfied, before the legatees should have the benefit of the trusts."

Lord *Harcourt* also pronounced a similar decree in the case of *Petre* v. *Bruen*.(*d*) There, a testator before the Statute of Fraudulent Devises, devised a freehold estate to his second son in fee, subject to the payment of his debts, and a legacy of 500*l*. The question being, whether the debts should be preferred to the legacy? Lord *Harcourt* said, he would expound the testator's meaning, as it ought to be, to pay his debts before he was charitable, and therefore decreed the debts to be first paid.(*e*)

(*z*) See also *Silk* v. *Prime*, 1 Bro. C. C. 138. note. *Bailey* v. *Ekins*, 7 Ves. 319. *Shiphard* v. *Lutwidge*, 8 Ves. 26. *Clay* v. *Willis*, 1 Barn. and Cress. 364. and the cases cited in the judgments.

(*a*) 2 Vol. 133. (*b*) 2 Vern. 405. 2 P. Will. 551.

(*c*) Cited by Lord Com. Hutchins in *Greaves* v. *Powell*, 2 Vern. 248.

(*d*) Stated in *Walker* v. *Meager*, 2 P. Will. 551.

(*e*) See also *Kidney* v. *Coussmaker*, 12 Ves. 154. per Sir *William Grant*. *Walker* v. *Meager*, Moseley Rep. 204. 2 P. Will. 551. *Maylen* v. *Hooper*, Cas. Temp. Hard. 206.

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